SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v FJA* [2021] QSC 109
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **FJA** (respondent)
FILE NO/S:	BS No 10200 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	Order made on 13 May 2021, reasons delivered on 21 May 2021
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2021
JUDGE:	Davis J
ORDERS:	**The Court being satisfied to the requisite standard that the respondent has contravened supervision requirements 27 and 31 of the order made by Ryan J on 1 December 2020 ("the supervision order") orders that:** **1. Under s 22 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, the respondent be released from custody and continue to be subject to the requirements of the supervision order.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where a supervision order was made on 1 December 2020 with respect to the respondent under Division 3 of Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (the Act) - where the supervision order contained conditions prohibiting the ingestion of illegal drugs or prescription drugs that had not been prescribed - where it was alleged that the respondent had ingested methylamphetamine and the prescription drug Lyrica in contravention of the order - where a warrant issued for the arrest of the respondent pursuant to the Act - where the applicant sought orders with respect to

the respondent under s 22 of the Act - where the psychiatric evidence suggested that the adequate protection of the community could be ensured by the release of the respondent on supervision notwithstanding the contravention - whether the adequate protection of the community could be ensured by the release of the respondent on supervision notwithstanding the contravention

Dangerous Prisoners (Sexual Offenders) Act 2003, s 2, s 3, s 5, s 13, s 14, s 15, s 16, s 20, s 22, s 27, s 30

Attorney-General for the State of Queensland v Ellis [2012] QCA 182, followed
Attorney-General (Qld) v Fardon [2013] QCA 64, followed
Attorney-General for the State of Queensland v FJA [2018] QSC 291, related
Attorney-General for the State of Queensland v FJA [2020] QSC 359, related
Attorney-General v Francis [2007] 1 Qd R 396, followed
Attorney-General (Qld) v Francis [2012] QSC 275, followed
Attorney-General v Lawrence [2010] 1 Qd R 505, followed
Attorney-General (Qld) v Yeo [2008] QCA 115, followed
Kynuna v Attorney-General (Qld) [2016] QCA 172, cited
LAB v Attorney-General [2011] QCA 230, followed
R v Hood [2005] 2 Qd R 54, cited
Turnbull v Attorney-General (Qld) [2015] QCA 54, followed

COUNSEL: S Richards for the applicant
L Reece for the respondent

SOLICITORS: GR Cooper, Crown Solicitor for the applicant
Legal Aid Queensland for the respondent

[1] The Attorney-General sought orders pursuant to s 22 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA) consequent upon an alleged breach by the respondent of a supervision order made by Ryan J on 1 December 2020. On 13 May 2021, I made the following order:

> "The Court, being satisfied to the requisite standard that the respondent has contravened supervision requirements 27 and 31 of the order made by Ryan J on 1 December 2020 ('the supervision order'), orders that:
>
> 1. Under s 22 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, the respondent be released from custody and continue to be subject to the requirements of the supervision order."

[2] These are my reasons for making that order.

Background

[3] The respondent was born on 25 January 1990. He is now 31 years of age.

[4] The respondent has been convicted of various offences such as breaking and entering and stealing together with driving and traffic offences. However, from February 2013 he acquired a significant criminal history for sexually offending against boys.

[5] On 21 February 2013, the respondent was convicted in the Maryborough District Court of two counts of unlawful sodomy against a 14 year old friend of his brother. He was sentenced to 18 months imprisonment. On 2 December 2016, again in the Maryborough District Court, he was convicted of four counts of indecent treatment of children, one count of grooming a child under the age of 16 years with intent to procure engagement in a sexual act (which was a domestic violence offence), one count of grooming a child under 16 years of age with intent to expose the child to indecent matter (a domestic violence offence), failing to comply with reporting obligations and three counts of contravention of a domestic violence order.

[6] Various sentences and orders were imposed upon him the effect of which was that he was sentenced to three years imprisonment suspended after serving 12 months at which time he was to be released on probation. Such a sentence was structured in a way authorised by the Court of Appeal in *R v Hood*.[1] The respondent had served 305 days of pre-sentence custody which was declared as time served on the sentences imposed and so he was released in early 2017.

[7] In June 2017, the respondent was convicted of failing to comply with reporting obligations. That constituted a breach of the suspended sentences and the probation order and he was returned to custody in June 2017.

[8] The counts of unlawful sodomy which were the subject of convictions on 21 February 2013 were described by Applegarth J when making a continuing detention order against the respondent in these terms:

> "[13] The offending occurred between 1 September 2010 and 21 October 2010. The victim, CQ, was aged 14 at the time and had met the respondent through the respondent's brother with whom he went to school. After becoming friends with the respondent's brother, CQ would often visit the respondent's house. CQ would often attend the house and consume alcohol. He recalled that, at some stage, the respondent showed a sexual interest in him.
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> [14] The first offence occurred in the respondent's bed after he told CQ that he wanted to 'do him in the arse'. The respondent put himself in a position to penetrate CQ which he said hurt him. The respondent did not fully penetrate CQ. The respondent told him that it would not hurt once his penis went fully into him but CQ told him to stop, which he did.
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> [15] The second offence occurred when, sometime after the first offence, CQ was showering with the respondent in the upstairs part of the house. The respondent suggested that they 'do stuff', like the last time. He told CQ to bend over, which he did. He tried unsuccessfully to enter CQ. He then put soap on

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1 [2005] 2 Qd R 54.

> CQ's anus and tried again. CQ said that it stung. When penetration couldn't occur the activity stopped."[2]

[9] The various offences for which the respondent was convicted on 2 December 2016 were described by Applegarth J in these terms:

> "[20] The victims, in relation to these offences, were two males both aged 12 at the time: the respondent's younger brother (L), and L's friend, S. This offending occurred between 24 December 2015 and 31 January 2016.
>
> [21] The respondent told L that he wanted to see him naked and asked him to send naked photos of himself. He also asked to perform oral sex on L. The respondent told L that he would give him money, credit cards, photos of naked girls, toys, games and an X-box game, if he sent the photos and let him perform oral sex on him. The respondent also told him that if he did not comply, he would physically hurt him or tell his mother that he had been misbehaving. The respondent made these requests weekly in person, by phone or online. He also sent L an explicit picture of a female.
>
> [22] The respondent massaged S and performed oral sex on him on four separate occasions. The respondent told S that he was practising for a massage course and needed to practise. S stated that the respondent would suck and masturbate his penis during the massages."

[10] On 6 December 2018, Applegarth J made a continuing detention order[3] against the respondent.[4] In summary, and no doubt without doing justice to his Honour's reasons for judgment, his Honour concluded that the respondent (an untreated sex offender) was an unacceptable risk of committing a serious sexual offence unless he received treatment before release from prison.

[11] The continuing detention order was reviewed by Ryan J pursuant to Part 3 of the DPSOA[5] on 30 November 2020. Her Honour delivered judgment on 1 December 2020.[6] Her Honour affirmed the decision of Applegarth J that the respondent was a serious danger to the community in the absence of an order under the DPSOA.[7] However, her Honour rescinded the continuing detention order and released the respondent on supervision. In summary, again no doubt without doing justice to her Honour's reasons for judgment, her Honour found the treatment the respondent received whilst detained lowered the relevant risk to an acceptable level.

[12] The supervision order contained various conditions, including conditions 27 and 31, in these terms:

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2 *Attorney-General for the State of Queensland v FJA* [2018] QSC 291 at [13]-[15].
3 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 13(5)(a).
4 *Attorney-General for the State of Queensland v FJA* [2018] QSC 291.
5 In particular, ss 27 and 30.
6 *Attorney-General for the State of Queensland v FJA* [2020] QSC 359.
7 Section 30(1).

> "27. You are not allowed to take (for example, swallow, eat, inject, smoke or sniff) any illegal drugs. You are also not allowed to have with you or be in control of any illegal drugs.
>
> 31. You must take prescribed medicine only as directed by a doctor. You must not take any medicine (other than over the counter medicine) which has not been prescribed for you by a doctor."

[13] On 4 March 2021, the respondent was arrested pursuant to a warrant that had issued pursuant to s 20 of the DPSOA alleging contraventions of conditions 27 and 31 of the supervision order.

[14] The particulars of the contraventions, as alleged in the application filed by the Attorney-General, are:

> "On 3 March 2021, the respondent submitted a sample of urine for analysis in accordance with requirement (28) of the supervision order and presumptive positive results for amphetamine and methylamphetamine were identified. The samples were sent to Sullivan Nicolaides Pathology ('SNP') for confirmation testing.
>
> On 4 March 2021, confirmatory results were received from SNP and indicated that amphetamine and methylamphetamine were detected at levels of 2299 ug/L and 8000ug/L respectively with these results above the cut off of 150ug/L and indicative of the use of the illegal drug, methylamphetamine.
>
> Further, on 4 March 2021, the respondent admitted to consuming Lyrica, a controlled medication which he is not prescribed and as such this use is considered illicit."

Statutory context

[15] The DPSOA provides for the continued detention or supervised release of "a particular class of prisoner".[8] The prisoners the subject of the DPSOA are those serving a term of imprisonment for a "serious sexual offence"[9] which is "an offence of a sexual nature … involving violence" or "an offence of a sexual nature … against a child".[10]

[16] The Attorney-General may apply to the court for orders against those prisoners. The court may make a continuing detention order[11] or a supervision order.[12] A continuing detention order requires the detention in custody of the prisoner beyond the date of expiry of the sentence then being served. A supervision order provides for the release of the prisoner under supervision notwithstanding the expiry of the sentence.

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8 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 3.
9 Section 5(6).
10 Section 2 and the Schedule (Dictionary).
11 Sections 13, 14 and 15.
12 Sections 13, 15 and 16.

[17] Section 13 is pivotal to the DPSOA. It has significance to the present application as the provisions which deal with breaches of supervision orders[13] adopt terms and concepts included in s 13. Section 13 provides:

> "**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.
>
> (3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—
>
> (a) by acceptable, cogent evidence; and
>
> (b) to a high degree of probability;
>
> that the evidence is of sufficient weight to justify the decision.
>
> (4) In deciding whether a prisoner is a serious danger to the community as mentioned in subsection (1), the court must have regard to the following—
>
> (aa) any report produced under section 8A;
>
> (a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;
>
> (b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;
>
> (c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offence sin the future;
>
> (d) whether or not there is any pattern of offending behaviour on the part of the prisoner;
>
> (e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour,

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13 Primarily see section 22.

including whether the prisoner participated in rehabilitation programs;

(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;

(g) the prisoner's antecedents and criminal history;

(h) the risk that the prisoner will commit another serious sexual offence if released into the community;

(i) the need to protect members of the community from that risk;

(j) any other relevant matter.

(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***).

(6) In deciding whether to make an order under subsection (5)(a) or (b)—

(a) the paramount consideration is to be the need to ensure adequate protection of the community; and

(b) the court must consider whether –

(i) adequate protection of the community can be reasonably and practicably managed by a supervision order; and

(ii) requirements under section 16 can be reasonably and practicably managed by corrective services officers.

(7) The Attorney-General has the onus of proving that a prisoner is a serious danger to the community as mentioned in subsection (1)."

[18] Section 13 operates in this way:

(a) the test under s 13 is whether the prisoner is "a serious danger to the community";[14]

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14 Section 13(1).

(b) that initial question is answered by determining whether there is an "unacceptable risk that the prisoner will commit a serious sexual offence"[15] if no order is made;

(c) if that conclusion is reached, then a supervision order (as opposed to a continuing detention order) can only be made where the adequate protection of the community can be ensured by the making of a supervision order;[16]

(d) where "adequate protection of the community" can be ensured by a supervision order, then the making of a supervision order ought to be preferred to the making of a continuing detention order.[17]

[19] If a contravention or likely contravention of a supervision order is suspected, a warrant may be issued pursuant to s 20 of the DPSOA. The court is then empowered to make orders pursuant to s 22. Section 22 provides as follows:

> "**22 Court may make further order**
>
> (1) The following subsections apply if the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the supervision order or interim supervision order (each the existing order).
>
> (2) Unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by the existing order as amended under subsection (7), the court must—
>
> (a) if the existing order is a supervision order, rescind it and make a continuing detention order; or
>
> (b) if the existing order is an interim supervision order, rescind it and make an order that the released prisoner be detained in custody for the period stated in the order.
>
> (3) For the purpose of deciding whether to make a continuing detention order as mentioned in subsection (2)(a), the court may do any or all of the following—
>
> (a) act on any evidence before it or that was before the court when the existing order was made;
>
> (b) make any order necessary to enable evidence of a kind mentioned in section 13(4) to be brought before it, including, for example, an order—

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15 Section 13(1) and (2).

16 Section 13(6).

17 *Attorney-General v Francis* [2007] 1 Qd R 396 at [39]; *Attorney-General (Qld) v Yeo* [2008] QCA 115; *Attorney-General v Lawrence* [2010] 1 Qd R 505; *LAB v Attorney-General* [2011] QCA 230; *Attorney-General for the State of Queensland v Ellis* [2012] QCA 182; *Attorney-General (Qld) v Fardon* [2013] QCA 64.

(i) in the nature of a risk assessment order, subject to the restriction under section 8(2); or

(ii) for the revision of a report about the released prisoner produced under section 8A;

(c) consider any further report or revised report in the nature of a report of a type mentioned in section 8A.

(4) To remove any doubt, it is declared that the court need not make an order in the nature of a risk assessment order if the court is satisfied that the evidence otherwise available under subsection (3) is sufficient to make a decision under subsection (2)(a).

(5) If the court makes an order in the nature of a risk assessment order, the psychiatrist or each psychiatrist examining the released prisoner must prepare a report about the released prisoner and, for that purpose, section 11 applies.

(6) For applying section 11 to the preparation of the report—

(a) section 11(2) applies with the necessary changes; and

(b) section 11(3) only applies to the extent that a report or information mentioned in the subsection has not previously been given to the psychiatrist.

(7) If the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by a supervision order or interim supervision order, the court—

(a) must amend the existing order to include all of the requirements under section 16(1) if the order does not already include all of those requirements; and

(b) may otherwise amend the existing order in a way the court considers appropriate—

(i) to ensure adequate protection of the community; or

(ii) for the prisoner's rehabilitation or care or treatment.

> (8) The existing order may not be amended under subsection (7)(b) so as to remove any requirements mentioned in section 16(1)."

[20] By s 22, once a contravention is proved the court must rescind the supervision order and make a continuing detention order[18] unless the prisoner satisfies the court that the adequate protection of the community can be ensured by his release back on supervision.[19] It is well-established that the concept of "the adequate protection of the community" in s 22(7) has the same meaning as it bears in s 13.[20] Therefore, a prisoner facing an application under s 22 must prove that the supervision order will ensure adequate protection of the community by removing any unacceptable risk that he will commit a serious sexual offence.

[21] However, the issue under s 22 of the DPSOA is not whether there is an unacceptable risk that the respondent will breach the supervision order. The issue is whether there is an unacceptable risk that he will commit a serious sexual offence.[21]

Expert opinion on risk

[22] There was extensive expert psychiatric and other medical evidence before both Applegarth J, when the continuing detention order was made,[22] and Ryan J, when her Honour made the supervision order.[23] It is unnecessary though to descend into an examination of that evidence. For the purposes of the present application, the respondent was interviewed by Dr Scott Harden psychiatrist, who prepared a report.

[23] Dr Harden diagnosed the respondent in these terms:

> "In my opinion he meets a diagnosis of Alcohol and polysubstance Abuse. He meets criteria for Personality Disorder not otherwise specified with mixed features (antisocial, borderline, dependent) and some evidence of psychopathy.
>
> Sexual preference for post-pubertal males in the form of Hebephilia is controversial as a paraphilia and does not always attract a diagnosis. He clearly has Hebephilia, sexually attracted to males, non exclusive."

[24] The psychiatrists who gave evidence before Applegarth J recommended that the respondent complete the High Intensity Sexual Offenders Program (HISOP). The respondent commenced the HISOP but withdrew from it. His mixed personality disorder, social anxiety disorder and low intelligence led to him being overwhelmed by the group setting in which the HISOP was conducted. Alternative treatment was then undertaken with psychologists, Ms Jacks and Dr Oertel. It was that treatment and the psychiatrists' opinion as to its effectiveness which ultimately led Ryan J to

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18 Section 22(2).
19 Section 22(7).
20 *Kynuna v Attorney-General (Qld)* [2016] QCA 172 at [60]; see also *Turnbull v Attorney-General* (Qld) [2015] QCA 54 at [36].
21 *Attorney-General (Qld) v Francis* [2012] QSC 275 at [64]-[67].
22 *Attorney-General for the State of Queensland v FJA* [2018] QSC 291.
23 *Attorney-General for the State of Queensland v FJA* [2020] QSC 359.

make the supervision order.[24] Against that background, Dr Harden in his latest report opined:

> "He has now undertaken some individual treatment intervention for sexual offending albeit incomplete. He has early and developing insight into the psychological factors relevant to his offending. His relatively severe personality disorder, trauma history and mild learning issues have combined to make group treatment[25] in custody or outside likely unachievable. He continues in individual psychological treatment, this is likely to require at least two years to have any significant impact on his offending risk.
>
> He previously had unsanctioned and unreported contact with young people while in the community in breach of his reporting requirements.
>
> He has a long history of polysubstance abuse with usual rapid reinstatement when not in custody. This substance use while not central to his sexual offending has been a significant factor. Since release on the supervision order he has made limited progress and appeared to deteriorate relatively rapidly and relapse into substance abuse possibly in the context of interpersonal relationship issues. This pattern in unsurprising given his past history."

[25] As to risk, Dr Harden said:

> "The actuarial and structured professional judgement measures I administered would suggest that his future risk of sexual reoffence is high (well above average) in the absence of a supervision order. My assessment of this risk is based on the combined clinical and actuarial assessment.
>
> His critical risk factors are a preference for early-mid adolescence postpubertal boys, severe personality disorder and substance abuse.
>
> Supervision and intervention consistent with a supervision order in my opinion will still reduce the risk to low-moderate by decreasing his capacity for use of substances and contact with young people.
>
> While the substance misuse increases his risk acutely it does not alter his long term risk profile.
>
> **Recommendations**
>
> I would recommend that if he were released from custody that he continue on a supervision order in the community as previously in place.
>
> I would recommend that he continue to be required to be abstinent from alcohol and drug use and undergo an appropriate random testing regime.

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24 *Attorney-General for the State of Queensland v FJA* [2020] QSC 359 at [71]-[80].

25 A reference to the HISOP.

> He should continue individual psychological therapy to further address his treatment needs.
>
> He should have no unsupervised contact with males under 16 years of age.
>
> Supervising staff should consider his trauma history and emotional instability in managing him."

Position of the parties

[26] The respondent admits the contravention. He submits, in reliance upon Dr Harden's evidence, that he has discharged the onus under s 22(7) of the DPSOA.

[27] The Attorney-General presses for a finding that the respondent contravened the supervision order. However, the Attorney-General acknowledges that on the basis of Dr Harden's opinion, it is open to the court to find that the respondent has discharged the onus under s 22(7).

Conclusions

[28] I find that the respondent contravened the supervision order as alleged.

[29] I find that the adequate protection of the community can be ensured by the release of the respondent on the supervision order notwithstanding the contravention.

[30] In forming that view, I have had regard in particular to:

1. While released on supervision, the respondent did not commit any sexual offence let alone a serious sexual offence as defined under the DPSOA.
2. The constraints placed upon the respondent by the supervision order led to his consumption of alcohol and other substances being quickly detected.
3. It is obvious, notwithstanding the contravention, that the respondent has made significant progress since being placed on a continuing detention order by Applegarth J and has continued treatment since being released on supervision.
4. I accept Dr Harden's evidence that the supervision order will reduce the relevant risk to low-moderate.
5. Having concluded that the adequate protection of the community can be ensured by the making of a supervision order, it is appropriate to favour the making of such an order rather than a continuing detention order.[26]

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

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[26] *Attorney-General (Qld) v Francis* [2007] 1 Qd R 396 at [39]; *Attorney-General (Qld) v Yeo* [2008] QCA 115; *Attorney-General v Lawrence* [2010] 1 Qd R 505; *LAB v Attorney-General* [2011] QCA 230; *Attorney-General for the State of Queensland v Ellis* [2012] QCA 182 and *Attorney-General (Qld) v Fardon* [2013] QCA 64.