

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Queensland v Donovan*
[2021] QSC 21

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(applicant)
v
ANTHONY JAMES DONOVAN
(respondent)

FILE NO/S: BS1879 of 2010

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: Orders made on 8 February 2021, reasons delivered on 16 February 2021

DELIVERED AT: Brisbane

HEARING DATE: 8 February 2021

JUDGE: Bradley J

ORDER: **THE COURT, being satisfied to the requisite standard that the respondent, Anthony James Donovan, has contravened requirements 6 and 27 of the supervision order made on 17 February 2020 ORDERS THAT:**

- 1. Pursuant to s 22(2) of the *Dangerous Prisoners (Sexual Offenders) Act 2003*, the respondent be released from custody and continue to be subject to the supervision order made on 17 February 2020.**

THE COURT FURTHER DIRECTS THAT:

- 2. The applicant arrange for copies of reports, namely the reports of Dr J Sundin, dated 12 October 2020 and Dr S Harden, dated 21 January 2020, be provided to the respondent's treating psychiatrist and Queensland Health.**

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 contravened a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (the DPSOA) – where urine samples provided by the respondent detected non-prescribed substances at material levels – where the respondent ceased taking his prescribed medication against medical advice – where the respondent failed to undertake a direction to contact Community Mental Health – where the respondent contravened the requirements of the supervision order by his use of non-prescribed substances and failing to comply with directions pursuant to the conditions of his supervision order – whether the respondent can satisfy the court that the adequate protection of the community can be ensured under the existing supervision order – where a consultant psychiatrist considered the presence of a supervision order reduced the respondent’s risk of sexual recidivism to moderate – where the psychiatric evidence supports ongoing psychiatric treatment and mental health and drug and alcohol services – where the respondent poses a moderate risk of sexual recidivism if released under a supervision order – where the respondent has not committed a sexual offence for more than 25 years – where the supervision order has thus far served its purpose in the community – where contraventions of the existing order did not involve the commission of a sexual offence – where the respondent has agreed to taking antipsychotic medication by depot – where the court is satisfied the adequate protection of the community can be ensured by the respondent’s release on the existing supervision order.

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13(5)(b), s 20, s 22, s 22(2), s 22(7), s 43AA

Attorney General for the State of Queensland v Donovan [2011] QSC 154, cited

COUNSEL: J Rolls for the applicant
V Trafford-Walker for the respondent

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

[1] This is a decision in an application made by the Attorney-General for the State of Queensland for relief pursuant to s 22 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (**the Act**). The respondent is Anthony James Donovan.

Background

- [2] Mr Donovan is 58 years of age. He has an extensive criminal history commencing in 1978, when he was about 16. As Boddice J observed, he had been incarcerated for most of his life since 1983.¹
- [3] In 1995, he was convicted and sentenced to 14 years imprisonment for offences committed on 15 June 1994, including robbery at knifepoint and sexual assault of a taxi driver. He was 32 when the offences were committed.
- [4] In 1995, while in custody, Mr Donovan committed a sexual offence involving forcing another inmate to perform oral sex upon him. He was convicted and sentenced to two years' imprisonment for that offence.
- [5] On 3 August 2010, Mr Donovan was made the subject of a supervision order pursuant to s 13(5)(b) of the Act. The order was for a period of 10 years. Mr Donovan was released from custody subject to that order on 24 September 2010.
- [6] On 22 October 2010, Mr Donovan was returned to custody pursuant to a warrant issued under s 20 of the Act.
- [7] On 3 June 2011, the Court found Mr Donovan had contravened his supervision order. It was revoked. Mr Donovan was detained in custody for an indefinite term for care, control or treatment. On 29 October 2012, this continuing detention order was reviewed and affirmed.
- [8] On 27 January 2015, on a further review, Mr Donovan was released from custody subject to a supervision order.
- [9] On 18 May 2015, Mr Donovan was returned to custody pursuant to a warrant issued under s 20 of the Act.
- [10] On 26 September 2016, Mr Donovan was found to have contravened his supervision order. Pursuant to s 22 of the Act, the supervision order was rescinded and Mr Donovan was detained in custody for care, control or treatment. On 18

¹ *Attorney General for the State of Queensland v Donovan* [2011] QSC 154 at [4].

December 2017, the continuing detention order was reviewed and affirmed. This occurred again on 4 February 2019.

- [11] On 17 February 2020, the continuing detention order was again reviewed. It was rescinded and Mr Donovan was made the subject of a supervision order, to be in effect until 17 February 2030.

Contraventions

- [12] On 6 March 2020, Mr Donovan provided a urine sample for testing, in accordance with the requirements of his supervision order. On 11 March 2020, a confirmatory report on a test of the sample detected two substances, Oxazepam and Buprenorphine at material levels. On 14 March 2020, a confirmatory report on a second sample of urine provided by Mr Donovan on 10 March 2020 detected both substances at material levels.
- [13] On 18 March 2020, Mr Donovan admitted using non-prescribed medication on two occasions. On 24 March 2020, he admitted he had ceased taking his prescribed medication, Seroquel, without seeking medical advice. On 31 March 2020, Mr Donovan reported for a case management meeting. He had been instructed to bring his medication and prescriptions to the meeting. He presented with medication issued in a seven day pack on 17 February 2020 and with prescription forms issued on 20 February 2020, which had not been filled. It was apparent from these circumstances that Mr Donovan had not been taking his medication as prescribed.
- [14] Mr Donovan told his supervising officer that he felt he did not need the medication and that he did not need to take medication every day. He said that medication was to be taken when you feel sick and he did not feel sick. Further enquiries revealed that, although Mr Donovan had been issued a direction to contact Community Mental Health, he had failed to do so.
- [15] On 1 April 2020, Mr Donovan's treating psychologist advised that, in her opinion, Mr Donovan's non-compliance with his medication regime was highly concerning. She also expressed the opinion that non-compliance in taking prescribed medication was likely to contribute to problems with self-awareness, impaired judgment, problems with coping and problem solving, poor modulation of impulses and use of

illicit substances as a form of self-medication. In her view it was also likely to interfere with his ability or motivation to comply with treatment and his supervision order. She considered that Mr Donovan's non-compliance with his medication regime constituted an increase in his risk of committing a sexual offence.

[16] A warrant issued pursuant to s 20 of the Act. It was executed and, on 6 April 2020, Mr Donovan was brought before the Court. He was detained in custody pending the determination of this application.

[17] On 21 August 2020, Mr Donovan pleaded guilty in the Magistrates Court at Brisbane to two offences pursuant to s 43AA of the Act. He was sentenced to one month imprisonment for each offence. Each sentence was wholly suspended for a period of three months.

[18] At the hearing, on 8 February 2021, Mr Donovan conceded that he had contravened requirements 6 and 27 of the supervision order by his failure to comply with directions or instructions pursuant to the conditions of his supervision order and by his use of Buprenorphine and Oxazepam. He accepted as accurate the factual matters recited above regarding his urine sample testing, the test results, the use of medication and his interview on 31 March 2020.

[19] Mr Donovan, therefore, accepted that the Court could be satisfied on the balance of probabilities that he had contravened the supervision order.

Consequences of the contraventions

[20] Mr Donovan also accepted that, pursuant to ss 22(2) and 22(7) of the Act, he bore the onus to satisfy the Court that the adequate protection of the community can, despite his contraventions, be ensured by a supervision order. He sought to do so, urging that the Court allow him to return to the community under the existing supervision order without any extension to the period of operation.

Evidence before the Court

[21] The Court received evidence from two psychiatrists.

Dr Sundin

- [22] Dr Josephine Sundin, consultant psychiatrist, provided a report dated 12 October 2020. It was the result of an interview Dr Sundin conducted with Mr Donovan on 18 September 2020. Dr Sundin had previously assessed Mr Donovan and provided reports to the Court dated 18 January 2019, 23 September 2019 13 February 2020.
- [23] Dr Sundin considered that Mr Donovan met the diagnostic criteria for the following conditions:
- (a) mixed personality disorder – borderline and antisocial personality traits;
 - (b) psychopathy;
 - (c) substance use disorder – opioids and amphetamines in sustained remission;
 - (d) sexual sadism;
 - (e) post-traumatic stress disorder; and
 - (f) mild intellectual impairment.
- [24] Dr Sundin considered Mr Donovan’s risk for sexual recidivism remained moderate to high and had not altered as a result of his time in the community. In Dr Sundin’s view, the presence of a supervision order reduces his risk of sexual recidivism to moderate. It does so by what Dr Sundin described as external controls. In Dr Sundin’s view, Mr Donovan cannot be relied on to make honest disclosures to enhance the efficacy of the supervision order. However, the existing order, in Dr Sundin’s view, has provisions that enable any escalating risk of sexual offending by Mr Donovan to be identified and appropriately acted upon.
- [25] In Dr Sundin’s view, if Mr Donovan were to be released under a supervision order, he should be referred to a consultant psychiatrist, with copies relevant past reports for that practitioner’s consideration, and he should also attend a drug and alcohol treatment service and have psychological treatment with his existing practitioner. Dr Sundin expressed the view that, if Mr Donovan were detained in custody, then the prison mental health services ought to review him to help resolve an issue about whether or not he suffers from schizophrenia. Dr Sundin also suggested consideration should be given to administering depot antipsychotic medication to Mr Donovan.

Dr Harden

[26] Dr Scott Harden, consultant psychiatrist, provided a report dated 21 January 2021. Dr Harden interviewed Mr Donovan on 12 November 2020. He had previously interviewed him on 6 December 2018 and 4 November 2019.

[27] In Dr Harden's view, Mr Donovan suffers from:

- (a) personality disorder – mixed severe, with borderline antisocial and psychopathic features;
- (b) sexual sadism;
- (c) substance abuse and dependence – in remission; and
- (d) possible psychotic disorder.

[28] Dr Harden assessed Mr Donovan's unmodified risk of sexual reoffending in the community as high. He identified the greatest risk factors being Mr Donovan's severe personality dysfunction and sexually sadistic fantasies. In Dr Harden's view, a supervision order would reduce the risk of Mr Donovan's sexual recidivism to moderate.

[29] Dr Harden recommended Mr Donovan have ongoing psychological treatment to manage and avoid negative emotional states. In Dr Harden's view, Mr Donovan will require ongoing mental health treatment and services, and psychiatric follow up. Mr Donovan should be abstinent from substance misuse. He should be considered for placement on an opioid replacement program and he should continue to receive support from the National Disability Insurance Scheme.

Consideration of the evidence

[30] The conclusion that a person who has been convicted of serious violent sexual offences poses a moderate risk of sexual recidivism if released under a supervision order is not comforting. In the absence of any other relevant evidence or consideration, it is unlikely such a risk would satisfy the Court that, on the balance of probabilities, the adequate protection of the community can, despite the contravention of an existing supervision order, be ensured by that order in its present or amended form.

- [31] In Mr Donovan's case, a number of the protective measures manifested in requirements of the existing supervision order depend to varying degrees upon Mr Donovan making honest disclosures to his case officers and treating psychologist. As Dr Sundin observed:

“During this most recent brief period of time in the community, he was quite actively deceptive and failed to disclose his actions not only to his case officers but to a treating psychologist whom he professed to like and in whom he had expressed confidence previously.

This failure of compliance at a quite fundamental level by Mr Donovan is a reflection of his psychopathic personality structure combined with a low intellect.

Together, these features impair his ability to foresee the consequences of his actions and contributing to him lacking a realistic or reasonable comprehension of the likely adverse consequences of his demonstrably poor judgment.

It is clear that Mr Donovan is a highly institutionalised individual who greatly struggles to cope outside the closely regulated environment of a prison. Away from that high level of structure; he quickly decompensates, makes poor choices and sets his own judgment ahead of trained clinicians and professionals.

Previous psychiatric risk assessments have frequently commented on the way in which emotional collapse and regression contributes to the heightened risk of sexual recidivism in this man.”

- [32] Despite these troubling considerations, it remains the case that Mr Donovan has not committed a sexual offence for more than 25 years. When he has been in the community, the supervision order has served its purpose of protecting the community. The close monitoring of Mr Donovan under the requirements in the order has resulted in the detection of his drug use and of his failure to comply with directions, most recently. This occurred without the cooperation of Mr Donovan and, it appears, despite his attempts to deceive or mislead his case officers and psychologist. Once detected, these breaches have caused his re-incarceration before any reoffending of a sexual nature occurred. Both the Attorney-General and Mr Donovan contend that this practical evidence demonstrates that the adequate protection of the community can be ensured by a supervision order, despite the past contraventions.
- [33] The significance of this fact is moderated by the knowledge that Mr Donovan has been out of custody for only three periods over the more than 25 years since his last

sexual offence; and those periods total only about 186 days;² about 2% of the time period.

[34] The contraventions of his existing supervision order did not involve the commission of, or even an attempt to commit, a sexual offence. Nor, it seems, did his previous contraventions of supervision orders.

[35] In his separate interviews with Dr Sundin and with Dr Harden, Mr Donovan demonstrated some growing understanding and insight in relation to his need to comply with the requirements of the supervision order. He also showed a positive mindset in those interviews and discussed his future plans.

[36] In written submissions for Mr Donovan, his instructions were recorded to the effect that he would be agreeable to taking antipsychotic medication by depot, as recommended by Dr Sundin and supported by Dr Harden. The Court may draw some comfort from Mr Donovan's agreement to such treatment. If he were to take his medication by this means (a time release mechanism), it would reduce some of the risk of him committing a serious sexual offence associated with Mr Donovan ceasing to use his prescribed medication.

[37] Of course, this is at heart a professional medical decision, dependent upon the judgment of the relevant treating practitioner. It would not be appropriate for the Court to include a requirement to that effect in the supervision order at this time.

[38] I accept the submission put on behalf of the Attorney-General that the evidence before the Court does not support a finding that Mr Donovan's risk of committing a sexual offence is imminent. I also accept the submission that Mr Donovan's psychiatric and psychological treatment needs can be addressed in the community under the terms of a supervision order. I also accept the Attorney-General's submission that the evidence before the Court does not support the need for any amendment to the existing supervision order.

[39] Although the decision is finely balanced, on the evidence presented to the Court I am persuaded that, on the balance of probabilities, the adequate protection of the community can be ensured by his release on the existing supervision order, despite

² 24 September - 22 October 2010 (28 days); 27 January – 18 May 2015 (11 days); and 17 February – 6 April 2020 (47 days).

his recent contraventions of it. It follows that I will make an order in terms of the draft prepared by the Attorney-General.

- [40] In my view, Mr Donovan's treating psychiatrist and psychologist in the community would benefit from access to the relevant material gathered in respect of this hearing, in particular, the reports of Dr Sundin and Dr Harden. A direction should be made to that effect.