SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Ashley Lennon Gibson* [2021] QSC 26
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (Applicant) **v** **ASHLEY LENNON GIBSON** (Respondent)
FILE NO/S:	4524 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED EX TEMPORE ON:	15 February 2021
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2021
JUDGE:	Callaghan J
ORDER:	**1. Pursuant to section 30(3)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, the Court affirms the decision made by Justice Dalton on 10 August 2017; and** **2. The respondent, Ashley Lennon Gibson, continue to be subject to the continuing detention order made on 10 August 2017.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the applicant seeks continuing detention order under the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), where the respondent seeks to be released from custody subject to a supervision order – where both the applicant and respondent agree that the respondent could subject to obtaining suitable accommodation, be released from custody on a supervision order – where evidence of psychiatrists is that individual treatment of respondent could subject to obtaining suitable accommodation, be done effectively in the community rather than in a custodial setting – where suitable

accommodation for the respondent in the community is difficult to find – whether prisons might become a "refuse heap" for people like the respondent

COUNSEL: M Maloney for the applicant
A Loode for the respondent

SOLICITORS: Crown Law for the applicant
Legal Aid Queensland for the respondent

[1] This respondent has an unusual criminal history. Although he exhibited antisocial and sometimes violent behaviour and had a long-standing issue with substance abuse, he first committed a sexual offence at the age of 32.

[2] Since his first offence, which has been described as a "relatively minor" wilful exposure, he has reoffended in what is described as "extraordinarily reckless and impulsive ways and often in circumstances where he was quickly identified as the culprit and apprehended". None of his sexual offending has involved penetrative behaviour. Rather, his offending for the most part took the form of exposing himself and masturbating in public as well as engaging in sexually explicit phone calls with strangers.

[3] The only sexual offences involving contact with others were committed in 2014 and 2015 when, whilst in public places, he touched the buttocks of two pre-teen girls. For the second of those offences he was, on 4 August 2016, sentenced to imprisonment for a period of 12 months. At the same time, he was sentenced to a cumulative period of eight months imprisonment for an offence of stalking that was committed over a five-day period in 2015. He had, by the date of sentence, already spent 229 days in pre-sentence custody and was declared eligible for parole on 19 September 2016.

[4] He was not granted parole. He served his sentences and then been the subject of two orders made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act").

[5] As a result, for offences which by any reckoning are amongst the least serious of their kind and for which a sentencing judge originally contemplated that he might

possibly serve as little as 265 days in custody, the respondent has been in prison now for a period of nearly five years.

[6] The reasons for this are explained in two judgments already delivered after applications made under the Act. Each of those decisions contains an analysis of the relevant parts of the legislation and the tests that are to be applied. I respectfully adopt and notionally incorporate into my reasons that which was written by Dalton J at page 7 of her judgment delivered on 10 August 2017 and by Davis J and, in particular, his Honour's analysis at paragraphs [11] to [16] of his judgment in *Attorney-General for the State of Queensland v Gibson* [2019] QSC 206.

[7] Dalton J had the benefit of psychiatric reports from Dr Harden, Dr Sundin and Dr Arthur and a neuropsychological report from Dr Michele Andrews. The judgment of Davis J also contains reference to evidence from forensic psychiatrist Dr Josephine Sundin, consultant psychiatrist Dr Kenneth Arthur and forensic and clinical psychologist Dr Madsen, each of whom has provided an updated report for the purposes of this application. Doctors Arthur and Sundin gave evidence before me today.

[8] I do not propose to rehearse in detail the contents of the previous judgments nor of the thorough reports that have been placed before me, nor of the evidence that was given in Court. It can be summarised in this way: the respondent has been found to be a "serious danger to the community" in those previous applications. However, as explained by Dr Sundin, he does not appear to have a primary paraphilia, hence the late onset in his offending. Nor does he present a physical danger, nor threaten to behave in a sexually violent way. Rather, there is the danger that he will do something like the things he has done before, such as make an obscene phone call or perhaps, more relevantly, expose his genitals, masturbate in front of people or opportunistically and inappropriately touch them.

[9] In other words, this application is brought at least in part on the basis of concern about the risk the respondent will behave in a way that is not at all uncommon in aged care hostels and dementia units.

[10] However, if released into the general community there is a prospect that such conduct might be directed towards a child. If released in circumstances in which

the respondent was allowed to have a telephone – and it is hard to function in society without one – it has to be allowed that he may make a call involving intimidation or threats which qualify as "violence" for the purposes of considering under the Act whether a serious sexual offence has been committed. So the respondent still presents as a continuing risk of committing physical acts which would match the elements of a "serious sexual offence" within the meaning of the Act.

[11] Conventionally, and even with the respondent's criminal history, if he was charged with and convicted of such an offence (for example, wilful exposure), it might be punished by a relatively brief and certainly finite sentence of imprisonment. But under the statutory regime here engaged, if there is an unacceptable risk that a serious sexual offence will be committed, then the terms of the Act mandate that the respondent not be released from custody without a supervision order being made. This is truly concerning in circumstances where I am confronted by Dr Madsen's opinion that the prospect of the respondent's sexual offending "is the result of brain dysfunction … rather than a primary paraphilia disorder".

[12] And Dr Sundin has written:

> "Given the marked physical restrictions placed on (the respondent) by his serious medical condition, he does not appear to represent any physical danger to women or any great danger for direct physical sexual violence. He does remain at risk for sexually disinhibited behaviour such as exposing his penis and genitals or masturbating in front of women or children. This behaviour does appear to be a consequence of disinhibition associated with his neurocognitive disorder".

[13] The "serious medical condition" to which the doctor refers makes the respondent's position even more compelling. His cognitive deficits are compounded by chronic renal failure, which makes him reliant upon haemodialysis, which, in turn, has a negative impact on his neurocognitive disorder.

[14] It is also troubling that Dr Sundin had difficulty in formulating any the reasons for which the respondent might commit an offence other than because of the disinhibition occasioned by his cognitive impairment.

[15] In those circumstances, I raised with the parties the potential significance of the fact that the respondent's natural infirmity might be depriving him of one of the

capacities identified in section 27 of the Criminal Code. Further, in the course of the hearing, concerns were expressed about his fitness, in the context of criminal proceedings, to enter a plea.

[16] On these issues, it should be noted that Dr Arthur gave evidence that although the aforementioned opinions may have merit, the respondent nonetheless retained some capacity to understand what he was doing. Dr Arthur opined that disinhibition was likely to play a role in any further offending but pointed out that the respondent still had a significant libidinal drive and an antisocial personality disorder. The doctor also pointed out the complexity of addressing the issue of fitness to plead. It has to be allowed that the materials before me do not permit for any sort of conclusion about that issue to be drawn.

[17] In any event, on behalf of the applicant, Ms Maloney drew my attention to the decision in *Harvey v Attorney-General for the State of Queensland* [2011] QCA 256. Although not directly on point, that case indicates that the Court should be concerned, in an application under this Act, with the question of whether the respondent is likely to commit the acts which would be the subject of an offence rather than whether he is likely to be convicted of that offence. And the evidence established, to a high degree of probability, that if the respondent was released without at least a supervision order, there was an unacceptable risk that he would perform such acts.

[18] There was, however, agreement that a supervision order could be fashioned which addressed those risks. It would have to be tailored with some particularity because the respondent does, it seems, require special attention. He would not be suited to release into what is known as the Wacol Precinct. He is not capable of independent living and requires a very high level of support. If not in prison, he will only function acceptably in the community in accommodation where he is offered 24 hour/7 day support. On the evidence, therefore, the respondent could be released on a supervision order only if it contained a condition that required him to stay in such accommodation.

[19] This was very much the situation as it presented on the last review before Davis J. His Honour warned that before the present review was undertaken:

> "Proper investigation should be made as to the availability of accommodation in a men's hostel providing 24-hour support."

[20] The materials before me demonstrate that such investigations have been made and, at one stage, it appeared as if they may have been successful. It follows that the sought after accommodation does exist and the respondent has NDIS funding that will facilitate his location in it. The hoped for placement did not, however, eventuate and now the problem is that such accommodation is proving to be so very rare. The lack of it is, as was said in evidence before me - without dissent from anyone:

> "a major deficit in the public health system."

[21] Davis J insisted, and I respectfully endorse his Honour's view that:

> "Continued incarceration … should not become the default position because of the unavailability of other less restrictive accommodation."

[22] But that is where the respondent is left – incarcerated. A purported object of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 is to facilitate rehabilitation. It was agreed that there was nothing more the prison system could do in that regard for the respondent. He is someone whose needs must be met by the public health system rather than under a corrective services regime. However, in the absence of suitable accommodation for people like him, prisons will become a refuse heap for individuals who cannot, by reason of mental infirmity, function in a socially acceptable way. In circumstances where adequate protection of the community can, in fact, be achieved in other ways, cases like this demonstrate that the Act is failing to meet its own objectives as expressed section 3. Prison beds are being occupied by people who do not need to be in them.

[23] I was told by Ms Maloney for the Attorney-General that all parties were aware of the fact that the situation was unsatisfactory. I was told that as soon as suitable accommodation became available, the Attorney would initiate proceedings as quickly as possible in order to ensure that the respondent was not detained in prison for any longer than necessary. I do not doubt the goodwill of all those involved, but no amount of it can remove the need for criticism of the fact that this situation has been allowed to develop and, unless it is addressed, will only continue to get worse.

[24] The order of the Court is that:

1. Pursuant to section 30(3)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, the Court affirms the decision made by Justice Dalton on 10 August 2017; and

2. The respondent, Ashley Lennon Gibson, continue to be subject to the continuing detention order made on 10 August 2017.