SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Banwell* [2021] QSC 66
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (Applicant) **v** **STEPHEN ROBERT BANWELL** (Respondent)
FILE NO/S:	BS 6760 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	29 March 2021
JUDGE:	Jackson J
ORDER:	**The respondent continue to be subject to the continuing detention 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 the respondent has a history of sexual offending ranging from 1975 to 2013 – where the respondent was diagnosed as having psychopathy, an anti-social personality disorder, a borderline intellectual function and a frontal lobe disorder – where the Court was satisfied on 18 December 2019 that the respondent was a serious danger to the community in the absence of an order under division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where the Court must review the continuing detention order made on that date at the intervals provided for under s 27 – whether the Court affirms the decision that the respondent is a serious danger to the community – whether there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody without a supervision order being made – whether the respondent should continue to be subject to the continuing

detention order or be released from custody subject to a supervision order – whether a supervision order can be made that would enable the reasonable and practicable management of the adequate protection of the community and so that any requirements under s 16 can be reasonably and practicably managed by corrective services officers.

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13, s 16, s 27, s 30

Attorney-General for the State of Queensland v Banwell [2019] QCS 312, cited

COUNSEL: J Tate for the Applicant
C Reid for the Respondent

SOLICITORS: Crown Law for the Applicant
Legal Aid Queensland for the Respondent

[1] This is the hearing of an application under s 27 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act") for review of a continuing detention order.

[2] On 18 December 2019, the Court was satisfied that the respondent was a serious danger to the community in the absence of a division 3 order,[1] and ordered that the respondent be detained in custody for an indefinite term for control, care or treatment.[2]

[3] Under s 27(1) of the Act, the Court must review that continuing detention order at the intervals provided for under that section. This is the hearing of the first review.[3]

[4] The first step under s 30 is whether the Court affirms the decision that the prisoner is a serious danger to the community in the absence of a division 3 order.[4] It may do so only if it is satisfied by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight.[5] And the Court must have regard to the required matters, meaning the matters identified under s 13(4) of the Act.[6]

[5] Although the text of subsections 30(1) and (2) refers to the Court affirming the decision that the prisoner is a serious danger to the community in the absence of a division 3 order,

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1 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 13(1).

2 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 13(5).

3 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 27(1A).

4 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(1).

5 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(2).

6 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(1).

it is not the Court's function on review to endorse or not endorse the original decision of that question. The Court is to decide afresh on the evidence as at the review whether the prisoner is a serious danger to the community in the absence of a division 3 order, by reference to whether there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody without a supervision order being made.[7]

[6] For the purpose of this hearing, the applicant obtained two risk assessment reports by psychiatrists as at February 2021.

[7] Dr Michael Beech identified the respondent's background, most of which is set out in the reasons of the Court for making the continuing detention order.[8] A useful summary that adds one detail not in the material before the Court on that occasion is as follows:

> "Mr Banwell has the chromosomal abnormality Klinefelter's Syndrome (XYY). Psychometric assessment had placed his Full-Scale IQ at 76 in 1983. Reassessment in 2015 gave a FSIQ of 57. In the community, Mr Banwell had been on a disability support pension since the age of 16 years, which he said was for chronic childhood-onset epilepsy and intellectual impairment. In 2011 he required surgery for a subdural haemorrhage; a CT scan subsequently showed frontal lobe scarring. He has a juvenile and adult history of offending. In the community, to some extent he has been dependent on the support of others but he has been able to travel freely despite this. Earlier prison file material indicated difficult behaviour and inappropriate sexual comments and behaviour. He has a significant history of sexual offending."

[8] The history of sexual offending ranges over the years from 1975 to 2013. It included three offences of indecent assault or assault of a female. In 1987, there were two offences of rape of a 15 year old girl who the respondent assaulted and raped after giving her a lift in a car. In 2013, there were two offences of rape of a 30 year old woman to whom the respondent offered overnight accommodation but who the respondent then drugged and raped.

[9] As summarised by Dr Beech, the respondent was diagnosed at the time when the continuing detention order was made as having psychopathy, an anti-social personality disorder, a borderline intellectual function and a frontal lobe disorder. He presented a high risk of serious sexual offending in the absence of a division 3 order.

[10] Noting the other psychiatrists' risk assessments, Dr Beech opined that there is a consensus view that the respondent has psychopathy. He indicated that he has been unable to engage in an appropriate high intensity sexual offender treatment program because of difficulties with intellectual functioning and memory. Dr Beech's view is that it is difficult to know to what extent that reflects his intellectual impairment, other cognitive difficulties and a psychopathic avoidance of responsibility.

[11] Dr Beech concluded:

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7 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 13(2).

8 *Attorney-General for the State of Queensland v Banwell* [2019] QSC 312.

> "In my opinion, the risk of Mr Banwell committing another sexual offence in the community is moderately-high. His age is certainly a factor that would lessen the risk. Against that, he has Psychopathy which operates to perpetuate the risk past the usual period of risk reduction. He has cognitive impairments that are likely to disinhibit him. I do not think he has any insight into his offending, or certainly no insight that he can display. I believe that his offending trajectory showed an increase in sophistication and an escalation in the nature of the offending. It has not started to lessen at that point."

[12] The respondent's history of offending includes use of psychological and physical coercion. The 2013 rape offences involved guile and subterfuge, when he offered accommodation to a woman and then drugged her before raping her. That showed an element of planning.

[13] Dr Robert Moyle also prepared a risk assessment report in February 2021. It supports and reaches largely the same conclusions as Dr Beech as to the respondent's risk of committing a serious sexual offence if released from custody without a supervision order being made. Dr Moyle's succinct conclusion is:

> "If released from custody without a Supervision Order being made, the risk remains high…

[14] Having regard to the recent risk assessment reports and to the reports of Dr Hatzipetrou dated 3 July 2020 and 3 January 2021 as well as the affidavits of Mr Smith sworn on 7 January 2021 and 5 March 2021 as to the respondent's performance in prison while subject to the continuing detention order, I am satisfied by acceptable, cogent evidence and to a high degree of probability that there is an unacceptable risk that the respondent will commit a serious sexual offence if released from custody without a supervision order being made. Accordingly, I find that he is a serious danger to the community in the absence of a division 3 order and that the decision to that effect should be affirmed.

[15] The second question is whether the respondent should continue to be subject to the continuing detention order or be released from custody subject to a supervision order.[9] In making that decision, the paramount consideration is the need to ensure adequate protection of the community,[10] and the Court must consider whether adequate protection of the community can be reasonably and practicably managed by a supervision order[11] and whether any requirements of the supervision order under s 16 of the Act can be reasonably and practicably managed by corrective services officers.[12]

[16] The applicant submits that the respondent cannot be reasonably and practicably managed by a supervision order. The applicant relies on the opinions of Dr Beech and Dr Moyle as to that conclusion, in the first place.

[17] Dr Beech expressed it thus:

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9 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(3).

10 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(4)(a).

11 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(4)(b)(i).

12 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(4)(b)(ii).

> "In my opinion, the issue is whether Mr Banwell could be released into the community where he could engage in more intensive treatment more frequently while under a supervision regimen that reduces his risk sufficiently. The barriers to his release on supervision are:
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> - The elevated risk of re-offending
> - Lack of demonstrable treatment response
> - Psychopathy
> - Lack of insight
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> But, more importantly, I think there is yet no suitable accommodation for him. While Mr Banwell may be able to settle in the prison environment, I believe in the community he will be heavily dependent on others for his basic needs. That level of dependence could not usually be met in a prison Precinct. He would not at this stage, in my opinion, be able to travel even with GPS monitoring freely within the community unescorted. That too provides significant barriers to risk reduction by supervision. His most recent offending has been more premeditated, and to the extent that the risk could be managed by intensive supervision, it would require much more than the usual progression through curfews that supervised offenders progress.
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> Ultimately, with great respect to the efforts by Dr Hatzipetrou, I do not think that much progress has been made to date and I have grave concerns that progress will by stymied while Mr Banwell is in custody. The best chance of treatment, assuming that he remains unsuitable for group programs, would be his release to the community where he could receive more intensive and more frequent sessions.
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> This though would necessitate secure accommodation, escorts, and intensive monitoring. I am uncertain if these demands could be met within a prison Precinct under the usual monitoring provisions of a supervision order."

[18] An affidavit by the Director of the High Risk Offender Management Unit of the Queensland Corrective Services ("QCS"), Community Corrections supports those concerns. So does Dr Moyle in his recent report, although Dr Moyle expresses the matter more forcefully in the form of the conclusion that the risk presented by the respondent requires his initial residence in a total institutional environment.

[19] I would mention that Dr Moyle expresses positive views of the respondent's treatment program with Dr Hatzipetrou, including that it "may allow a different assessment of current risk if [the respondent] spends a year of containing his urges to aggression and sexualisation of relationships such that there are no breeches (sic) or safety orders and a commitment to his plan". I do not give much weight to this view. It does not address the question for decision. That question is whether a supervision order can be made now that would enable reasonable and practicable management of the adequate protection of the

community and so that any requirements under s 16 can be reasonably and practicably managed by corrective services officers.

[20] In my view, some confusion is introduced into the relevant considerations by the way in which the risk assessment reports of the psychiatrists conflate the effect that a supervision order will have on the risk of the respondent committing a serious sexual offence if released on the one hand, and the respondent's need for and the complexities of arrangements that would be required for adequate care and support for his disabilities in the community, on the other hand.

[21] The source of any care and support services for the respondent's particular disabilities appears to lie in the National Disability Insurance Scheme ("NDIS") through the National Disability Insurance Agency ("NDIA"). The arrangement and provision of those services does not go to the risk of the respondent committing a serious sexual offence if released on a supervision order, per se. The problem is more practical.

[22] The usual conditions of a supervision order, and the usual processes by which the release of a prisoner on a supervision order are managed, would involve the respondent obtaining accommodation in temporary housing facilitated by QCS known as "the precinct" in proximity to a relevant prison in Southern Queensland, Central Queensland or Northern Queensland. Put simply, corrective services officers and QCS do not provide support by way of care and support services that may be needed by a prisoner with a disability released on a supervision order.

[23] To the extent that those arrangements might directly relate to the respondent's risk of committing a serious sexual offence on a supervision order, both Dr Beech and Dr Moyle expressed the view that the respondent would require appropriate supervision, and in Dr Moyle's case, specifically that it should be by a strong male support worker. Both also expressed concerns about the circumstances in which the respondent might travel into the community from his accommodation on the footing that he might need to be escorted.

[24] So far as accommodation is concerned, the affidavit of the Director of the High Risk Offender Management Unit further states that the accommodation or contingency accommodation provided by QCS to released prisoners who have no suitable alternative is subject to availability at the time of release and for an initial three month period, subject to review. The point advanced was that QCS does not consider its accommodation in the relevant precinct as being appropriate for the respondent.

[25] Further, the Director of the High Risk Offender Management Unit says that QCS does not have the capacity to "reliably and safely escort the respondent at all times in the community". Exactly what is meant is not clear. There is no analysis of whether support could be provided at prearranged times whilst the respondent is otherwise required to remain in identified accommodation.

[26] The Director also canvassed in detail the perceived difficulties in the ability of corrective services officers to detect compliance or breach behaviour of offenders subject to supervision, the requirements of case management, the requirements of supervision or electronic monitoring, the requirements of a curfew, and the requirements of substance testing. I express some concern at the extent to which those statements are directed to the respondent. The dispassionate consideration of the respondent's particular care and

support needs is not assisted by overstatements of every possible form of difficulty that might arise.

[27] Notwithstanding those matters, however, the position presently remains that neither this Court nor QCS has control over the means by which disability care or support services are provided to someone such as the respondent. It is a fundamental plank of the operation of a supervision order that any requirement ordered by the Court under s 16(2) for a prisoner's rehabilitation or care or treatment must be something that can be reasonably and practicably managed by corrective services officers.[13] The clear conclusion is that compliance with any requirement made by way of a condition under s 16(2) for the respondent's rehabilitation or care or treatment must be something that corrective services officers can reasonably and practicably manage.

[28] The conclusion is that the nature of the respondent's disabilities, and his need for care and support to meet them, mean that the adequate protection of the community cannot be reasonably and practicably managed on a supervision order containing requirements that can be reasonably and practicably managed by corrective services officers. The required services for the respondent's care and support are not available to him at present.

[29] There is another concerning aspect of the present application. It is that the respondent may not have the necessary ability to successfully negotiate the application process and obtain approvals for a high level care package under the NDIS that might go some way to bridging the gap between what QCS is prepared to make available to him by way of accommodation or care and support and what he needs. Again, there is no recognised mechanism for dealing with this difficulty in the respondent's case, or perhaps other cases like it. There is a possible mechanism of appointing a guardian for health and personal matters, but it is not one that is presently planned or adapted to circumstances like the present. The respondent personally raised the possibility of a guardian for financial matters during one of his numerous interruptions to the hearing of the application.

[30] Lastly, some mention should be made of Dr Beech's opinion that, with respect to the efforts (during treatment to address the respondent's past sexual offending and future relapse prevention plans) by Dr Hatzipetrou, Dr Beech has great concerns that progress will be stymied while the respondent is in custody. The possible future scenario emerges that even if sufficient disability care and support services were available to the respondent, he might have unmet treatment needs that will forestall further progress to release on a supervision order.

[31] The respondent does not submit that a supervision order should be made and concedes that it should be ordered that the respondent continue to be subject to the continuing supervision order.

[32] For these reasons, in my view, there must be an order that the respondent continue to be subject to the continuing detention order.[14]

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13 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(4)(b)(ii) and s 13(6)(b)(ii).

14 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(3)(a).