SUPREME COURT OF QUEENSLAND

CITATION:	*Harvey v Attorney-General (Qld)* [2014] QCA 146
PARTIES:	**SHANE EDWARD HARVEY** (applicant/appellant) **v** **ATTORNEY-GENERAL OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 6420 of 2012 Appeal No 5269 of 2013 Appeal No 9444 of 2013 SC No 1736 of 2006
DIVISION:	Court of Appeal
PROCEEDINGS:	General Civil Appeals Application for Extension of Time
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	25 March 2014
JUDGES:	Holmes and Fraser JJA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for an extension of time in Appeal No 9444/13 is refused.** **2. The appeal in Appeal No 6420/12 is dismissed.** **3. The appeal in Appeal No 5269/13 is dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN REFUSED – where the appellant has been the subject of continuing detention orders and a supervision order under the *Dangerous Prisoners (Sexual Offences) Act* 2003 (Qld) – where the appellant offered no explanation for why he had not previously sought to appeal against the imposition of a condition requiring that he not commit a further indictable offence – where the appellant contended that the provision was *ultra vires* the DP(SO)A – whether an extension of time to appeal should be granted CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the appellant

has been the subject of continuing detention orders and a supervision order under the *Dangerous Prisoners (Sexual Offences) Act* 2003 (Qld) – where the appellant appealed against a finding by a trial judge that the appellant had committed an assault occasioning grievous bodily harm – where the appellant was thus in breach of the indictable offence condition of the supervision order – whether the trial judge had erred in his use of what were said to be the appellant's lies told to police – whether the finding that the appellant had committed the offence was against the weight of the evidence or was unreasonable

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 brought an application for a continuing detention order – where the appellant had breached the supervision order – where the appellant had not discharged the onus on him to show that a further supervision order could, despite the breaches, ensure the adequate protection of the community – whether the trial judge gave adequate reasons for his decision to rescind the supervision order and make a continuing detention order

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 16, s 17, s 22, s 27(1)

Attorney-General for the State of Queensland v Ellis [2012] QCA 182, cited
Attorney-General for the State of Queensland v Fardon [2013] QCA 64, cited
Attorney-General for the State of Qld v Harvey [2013] QSC 125, related
Attorney-General for the State of Qld v Harvey (2012) 263 FLR 433; [2012] QSC 173, related
Attorney-General for the State of Queensland v Harvey [2007] QSC 366, related
Attorney-General for the State of Queensland v Sambo [2008] QSC 262, cited
Attorney-General for the State of Queensland v Thumm [2008] QSC 180, cited
Attorney-General for the State of Queensland v WW [2007] QCA 334, cited
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34, cited
Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited

COUNSEL: D P O'Gorman SC, with K M Hillard, for the applicant/appellant
P J Davis QC, with B H Mumford, for the respondent

SOLICITORS: Peter Shields Lawyers for the applicant/appellant
Crown Law for the respondent

[1] **HOLMES JA:** The appellant, who has at different times been the subject of continuing detention orders and a supervision order under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DP(SO)A), has brought an application for an extension of time and two appeals. The application for an extension of time is in order to appeal against a decision of Atkinson J to include in a supervision order, made in 2007,[1] a requirement that the appellant not commit an indictable offence during the period of the order. The first appeal concerns a finding made by Martin J in June 2012[2] that the appellant had committed an assault occasioning grievous bodily harm. The second appeal is against orders of Martin J, made in May 2013,[3] by which his Honour rescinded the supervision order which Atkinson J had made and imposed instead a continuing detention order.

The history of the DP(SO)A orders made against the appellant

[2] On 7 August 2006, a continuing detention order under the DP(SO)A was made against the appellant. He was then 37 and had a criminal history for offences of dishonesty dating back to his teenage years. More significantly, he had been convicted in May 1993 and again in August 1994 of rape, in each case committed on a woman unknown to him, and in the second instance while on bail for the earlier rape.

[3] In December 2007, Atkinson J undertook a review of the continuing detention order, as s 27(1) of the DP(SO)A required. There was agreement between the parties that the appellant, having made some progress and completed appropriate programs in detention, was now best managed by release on a supervision order. That position was supported by the reviewing psychiatrists and accepted by the presiding judge. The parties provided the judge with a draft order which included the condition that the appellant not commit an indictable offence during the period of the order. The transcript shows her Honour discussed some of the conditions in the draft order with the respondent's counsel, but no question was raised as to whether the indictable offence condition was necessary or appropriate. The appellant's counsel indicated that he had nothing to add to the debate, and the order was accordingly made, with that condition included.

[4] On 28 March 2008, a woman named Dianne Hawkins was brutally bashed in her unit at New Farm. She identified her attacker as the appellant, a former friend. He was charged on the same day with attempted murder, sexual assault and robbery. Ms Hawkins gave evidence at a committal proceeding. The appellant was indicted on charges of malicious act with intent, common assault and stealing. Ms Hawkins, however, died in 2010 before the trial could take place, and a nolle prosequi was entered on the indictment.

[5] Meanwhile, in April 2008, the respondent had made an application for rescission of the supervision order and substitution of a continuing detention order, alleging contraventions of the supervision order constituted not only by the alleged assault of Ms Hawkins, but also by the appellant's return of a urine sample indicating the use of cannabis, breaches (two) of curfew, having a male child aged two at his residence

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1 *Attorney-General for the State of Queensland v Harvey* [2007] QSC 366.
2 *Attorney-General for the State of Qld v Harvey* [2012] QSC 173.
3 *Attorney-General for the State of Qld v Harvey* [2013] QSC 125.

and failing to attend on and be assessed and treated by psychiatrists as directed. No further steps were taken in that application pending the determination of the criminal proceedings.

[6] In December 2011, an order was made for a separate hearing of the question of whether the supervision order had been breached. The appellant made a cross-application for a declaration that the indictable offence condition was unconstitutional and an order severing it from the supervision order; the dismissal of the respondent's application for a continuing detention order; and an order excluding Ms Hawkins' evidence. Martin J dealt with the separate question and with the cross-application in April 2012. He dismissed the latter and found that the appellant had assaulted Ms Hawkins, thus breaching the indictable offence condition of the supervision order.

[7] The respondent's application for a continuing detention order was adjourned; and was heard over a year later. Martin J found that the appellant had breached the supervision order in all the respects alleged. He concluded that the appellant had not discharged the onus on him to show that a further supervision order could, despite the breaches, ensure the adequate protection of the community. Consequently, his Honour rescinded the existing supervision order and made a continuing detention order.

The application for an extension of time

[8] The appellant did not offer any explanation of why he had not previously sought to appeal against the imposition of the condition requiring that he not commit a further indictable offence. Presumably, it had something to do with his original willingness to accept it. He argued instead that the merits of the appeal were such that an extension of time should be granted. The proposed ground of appeal was that the provision was *ultra vires* the DP(SO)A.

[9] Section 16(1) of the DP(SO)A sets out requirements which must be contained in a supervision order. They include that the supervised person "not commit an offence of a sexual nature during the period of the order".[4] As well as those mandatory conditions, others may be imposed:

> "16(2) The order may contain any other requirement the court or a relevant appeal court considers appropriate—
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> (a) to ensure adequate protection of the community; or [Examples omitted.]
>
> (b) for the prisoner's rehabilitation or care or treatment."

[10] The appellant contended (and the respondent did not disagree) that the protection referred to was protection of the community against further sexual offending; but he advanced the further proposition that all that the Act required and authorised in relation to the commission of future offences was the mandatory condition that the prisoner not commit any offence of a sexual nature. It was suggested that two first instance decisions, of Douglas J in *Attorney-General for the State of Queensland v Thumm*,[5] and of Applegarth J in *Attorney-General for the State of Queensland v*

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4 Section 16(1)(f).

5 [2008] QSC 180 at [9]-[11].

Sambo,[6] went some way to support that proposition. However, neither decision extends beyond a determination made on its facts: in each case that, given the existence of other conditions minimising risk, such a condition was unnecessary.

[11] As it seems to me, whether a condition that a prisoner not commit an indictable offence for the duration of a supervision order is capable of being "appropriate to ensure adequate protection of the community" against further sexual offending must in any given case be a question of fact. It is unlikely that such a broad condition will in most instances be necessary or appropriate, but it is not inconceivable that a prisoner's pattern of offending (for example, escalation from general criminal offences to sexual offences) may be such that the condition is apposite. I would not accept, therefore, that it is beyond the power of the court under s 16(2) to impose such a condition.

[12] In any event, I would not grant an extension of time to appeal on this point, for a number of reasons. Firstly, the condition was not the subject of any submission on behalf of the appellant and he did not take any issue about it until the question of breach arose after a matter of years. Secondly, as the respondent pointed out, had the appellants brought a timely appeal and succeeded on the *ultra vires* argument, it is likely that a condition in an altered form would have been substituted: for example that he not commit an offence of violence. Thirdly, Atkinson J's order had effect unless and until it was set aside. At the time of the alleged contravention, the condition was a binding requirement.

Martin J's finding of assault

[13] Having rejected the appellant's argument that the indictable offence condition was unconstitutional, Martin J determined that the appellant had assaulted Ms Hawkins. Her evidence at the committal, in which she identified the appellant as her assailant, was tendered and was relied on by the judge. His Honour rejected the evidence of a witness who said that Ms Hawkins had told her she was uncertain as to whether the appellant was her attacker. However, he took into account the facts that Ms Hawkins suffered from schizophrenia, that some of her evidence was contradicted by other witnesses and that she had given varying accounts of the assault.

[14] Martin J noted that at about 7.15 am on 28 March 2008, the day Ms Hawkins was assaulted in her New Farm unit, the appellant was shown on closed-circuit television footage in Brunswick St, two streets away from the street in which her unit was located, and walking in its direction. At 9.15 am he was filmed at the Fortitude Valley railway station. (By way of context, at about 8.42 am an ambulance was dispatched in response to Ms Hawkins' telephone call to the emergency number). Ms Hawkins had said that the appellant when he attacked her was wearing a white t-shirt, blue jeans and a blue coat, the same combination of clothing in which the appellant could be seen when he first appeared on the footage. On his return to the railway station, he was wearing shorts, a singlet and the blue coat.

[15] Police found the appellant at the Goodna shopping centre at about noon that day. Questioned about his activities that day and whether he had "been around Goodna all day", he answered in the affirmative and said that he had been shopping with his brother. He was asked further questions and responded as follows:

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6 [2008] QSC 262 at [19]-[21] and [84] – [89].

> "Have you been to Fortitude Valley at all today?—I don't know.
>
> It's not that hard of a question about knowing whether you were in the Valley or not, it's a simple yes or no answer?—No."

[16] When Ms Hawkins was treated in hospital, a nurse found a crumpled piece of paper "against her genital/anal area". In her statement, Ms Hawkins said that during the assault she had felt her attacker "do something to [her] bottom area", although she did not know what it was. The piece of paper which the nurse found contained allegations against the appellant, including a claim that he had stolen money from Ms Hawkins.

[17] Martin J summarised the matters he considered relevant in determining whether the appellant had assaulted Ms Hawkins:

> "(a) The statements made by Ms Hawkins;
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> (b) The weight which should be given to those statements;
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> (c) The inconsistencies which have been identified in those statements;
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> (d) The incontrovertible video evidence of the respondent's presence near the deceased's home unit;
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> (e) The motive that Mr Harvey had to attack her, namely, the assertions she had made that he had stolen from her;
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> (f) The change in clothing he made at a time after he was last seen on the surveillance cameras when he was heading towards the direction of Heal Street and when he was next seen; and
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> (g) The untruths he told to the police after being picked up at Goodna."

He expressed himself satisfied that the appellant had assaulted Ms Hawkins.

[18] The appellant appealed against Martin J's determination of the separate question on the grounds that his Honour had erred in his use of what were said to be the appellant's lies and that his finding that the appellant had committed the offence was against the weight of the evidence or was unreasonable.

The use of lies

[19] As to the first ground, the appellant's complaint was that the primary judge had not identified the lie relied on; did not satisfy himself that it was a deliberate untruth; and did not consider the law as to the relevance of lies as showing a consciousness of guilt. In particular, he had not considered the appellant's explanation, or the explanations given on his behalf, for the lies.

[20] In fact, Martin J identified the lies which he regarded as of consequence at (g) in the list of relevant matters: as the untruths the appellant told police after being picked up at Goodna. His Honour had detailed those untruths earlier in his judgment as

being the appellant's claims that he had not gone to Fortitude Valley and had been shopping at Goodna. And it was not necessary for the judge to consider "explanations" which were not given, or lacked basis in fact.

[21] The appellant did not in fact offer any explanation of the lies; he simply denied telling them. His lawyers' explanations for the falsity were that the appellant had a low IQ and that he might have been afraid of telling the truth, knowing that the police were investigating an offence. Dr Lawrence, one of the examining psychiatrists, described the appellant as in the "borderline" range. But there was no evidence that such a deficiency of intellect would produce dishonesty. Rather, Dr Lawrence spoke of the appellant's being "primarily directed towards…satisfying his own needs", observing

> "That means he is able to exploit others without a great deal of conscience or feelings of discomfort and guilt";

an analysis which suggested an underlying cause for the falsehood other than want of intellect. As to the second "explanation", as a matter of speculation, the possibility existed that the appellant was driven by concern that he might be wrongly accused. It could carry little weight, however, when the appellant himself said nothing of the sort.

[22] The respondent squarely placed the appellant's false denial of presence in Fortitude Valley before the trial judge as showing a consciousness of guilt; a lie of the *Edwards*[7] type. It was entirely unnecessary for his Honour to set out a statement of the law relating to lies. It is quite clear that he was satisfied, with good reason, that what the appellant had said to the police were deliberate untruths, told because of the consciousness that to reveal his whereabouts would implicate him in the offence.

Finding "against the weight of the evidence or unreasonable"

[23] The appellant, while conceding that there might have been a prima facie case against him, made the point that it was necessary for the respondent to establish the commission of the assault to the *Briginshaw* standard[8]. A number of matters were said to have precluded satisfaction to that standard. Ms Hawkins' reliability was in doubt because she had admitted to memory problems and she suffered from schizo-affective disorder. Although she said she had scratched her attacker hard on the face and arms, drawing blood, the appellant had no injuries of that type, and there was no evidence of any skin or DNA of another person under her long fingernails.

[24] There were some bloodied shoe impressions found in the unit but they did not match the appellant's shoes. None of the appellant's DNA was located on Ms Hawkins or at her unit, although DNA from an unknown person was found in her bathroom and kitchen and on hand-rolled cigarette butts in the unit. There was a large amount of blood on Ms Hawkins and around her unit, but no blood was found on the appellant's shoes, monitoring device (worn on his ankle) or hands.

[25] Ms Hawkins had telephoned for an ambulance, which was dispatched at about 8.42 am, suggesting that the assault was at about 8.00 am. At about 8.30 am, a neighbour saw a man near the front door of Ms Hawkins' unit. Her description of him did not

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7 *Edwards v The Queen* (1993) 178 CLR 193.

8 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

match the appellant's and she did not identify the appellant when shown a photoboard. Another neighbour had heard loud voices at about 5.00 am; if that occurred during the attack on Ms Hawkins, it was before the appellant had left Wacol.

[26] Martin J expressly referred to the need to assess the evidence in accordance with the principles set out in *Briginshaw*, so there can be no suggestion that he did not appreciate the standard of satisfaction as to guilt required. The matters raised by the appellant are not such as to preclude "reasonable satisfaction", notwithstanding the gravity of the allegations. Taking them in turn, there was no reason to suppose that whatever produced the loud voices at 5.00 am had anything to do with the assault on Ms Hawkins. The fact that at around 8.30 am a neighbour saw a man near her door who was probably not the appellant does not take matters any further; there was no evidence that that man had been in Ms Hawkins' unit or was connected with the assault.

[27] As to the lack of forensic evidence, as the respondent pointed out, the police did not speak to the appellant at Goodna until he had returned home, showered and changed. On the Fortitude Valley CCTV footage, the appellant could be seen wearing brown lace-up shoes; in cross-examination he agreed that was his footwear. Those shoes were not found by the police. The appellant changed into joggers, the light-coloured shoes referred to in submissions, on his return to Wacol. That change of clothes and shoes would seem to undercut the significance of the absence of blood on him, and the fact that the shoes worn in the Valley were not found accounts for the lack of a match with the impressions found in Ms Hawkins' unit.

[28] The primary judge accepted that there were criticisms to be made of Ms Hawkins' evidence and plainly assessed it having regard to them. He noted that Mr Harvey bore no signs of having been scratched, and went on to observe that it was possible Ms Hawkins attempted unsuccessfully to scratch her assailant. The conclusion that Ms Hawkins was wrong in her evidence in this regard did not necessitate rejection of her identification of the appellant as her attacker. She knew him; she correctly described the clothes he was wearing; he was in the vicinity and lied about that fact; and, compellingly, a piece of paper which related to the appellant was found on her body. In my view, his Honour's finding that it was the appellant who had assaulted Ms Hawkins was the obvious and overwhelming conclusion to be drawn from all of the evidence.

The decision to rescind the supervision order and make a continuing detention order

[29] Section 22(2) of the DP(SO)A sets out what the court must do when it is established that a released prisoner has contravened (or is likely to contravene) a supervision order:

> "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—
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> (a) if the existing order is a supervision order, rescind it and make a continuing detention order; or
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> (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."

[30] When Martin J came to consider whether the supervision order should continue, he found that five separate breaches of it had been established: the appellant had tested positive to cannabis; had breached his curfew on two occasions; had had a two year old male child at his residence at Wacol; had failed to attend and be assessed by a psychologist; and, of course, had assaulted Ms Hawkins causing her grievous bodily harm. His Honour reviewed the opinions of three psychiatrists, Dr Lawrence, Dr Moyle and Professor Morris, who had examined the appellant and had given evidence. He considered the evidence of a Ms Lindley, with whom the appellant proposed to live if he were released, and concluded that she did not appear to be a person who could be relied on to assist the appellant or provide an environment likely to help him to comply with a supervision order.

[31] Martin J made these findings:

> "[35] The ingestion of cannabis was very serious. The risk of offending behaviour by the respondent is magnified by the disinhibiting influence of an intoxicant like cannabis. His use of that drug only two months after being released into the community is a confirmation of the opinion of Dr Moyle of his lack of control. There was evidence, and there were submissions, about the use of electronic devices which would alert authorities if the respondent entered into areas which had been identified for the purposes of a supervision order as high risk in that they contained the hotels which he might frequent. While that is accepted, such a device cannot be used to determine when the respondent might enter into an area where cannabis is available. While it is common knowledge that cannabis can be obtained in many hotels and nightclubs, it is also well known that it can be obtained in many other places.
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> [36] It was conceded by Mr Wilson – properly in my view – that the assault on Dianne Hawkins was a very serious breach and that reoffending in a violent way is relevant to the risk of reoffending in a sexual way. The assault on Ms Hawkins occurred only four months after the release of the respondent on the last occasion. He engaged in an act of great violence and that conduct fits with the views of both Dr Lawrence and Dr Moyle.
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> …
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> [39] Dr Lawrence and Dr Moyle were in broad agreement about the prospects of the respondent and the likelihood of reoffending. Professor Morris had a more generous view of his prospects. I have given more weight to the opinions of Drs Lawrence and Moyle because they have observed the respondent for a much longer time and have provided other opinions. Professor Morris has only seen the respondent once and did not have the advantage that the other two psychiatrists had. They were both of the view that if he was to be released from custody without a supervision order then

> he would be a high risk of reoffending. While both accept that the imposition of a supervision order would reduce that risk, both Dr Lawrence and Dr Moyle place a caveat on that opinion because of their judgment as to the respondent's capacity to comply with such an order.
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> [40] Dr Moyle was of the view that the respondent's problems with authority would continue to cause difficulties for those charged with monitoring and supervising his release in the community. He drew a distinction between the circumstances of release subject to a supervision order and incarceration. The environment of a prison works to control impulsiveness and, of course, does not offer the opportunity for such impulsive behaviour to the respondent. Dr Lawrence refers to the difficulty he has in planning and thinking through consequences, his impulsivity and his considerable rigidity of thought and opines that he would not be able to move beyond his self-justification and the denial of responsibility which he has exhibited in the past.
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> [41] I accept the submission of the applicant that the respondent would be likely to resent and to resist the constrictions of a supervision order. The plan which he has presented, should a supervision order be made, was lacking in detail and did not provide any comfort for a conclusion that his plans would work to assist him in complying with a supervision order. He remains a high risk of reoffending sexually if released and a lesser risk if released under supervision. The proposals for electronic monitoring would not necessarily operate to prevent him from engaging in conduct which would disinhibit him, namely, the sort of conduct he engaged in within two months of release on the previous occasion.

[32] His Honour concluded:

> [42] Those matters lead me to the view that there is a substantial likelihood that if released under a supervision order the respondent would breach it in important conditions. In other words, supervision is not apt to ensure adequate protection of the community. The respondent has not discharged the onus upon him."[9]

The adequacy of the judge's reasons

[33] The appellant submitted that the primary judge had failed to provide adequate reasons for his decision and had erred in his interpretation and application of the expression "adequate protection of the community" as it appears in s 22(2) of the DP(SO)A.

[34] Section 17 of the DP(SO)A requires the court when making an order under the Act to give "detailed reasons". The purposes of that requirement were identified in *Attorney-General (Qld) v Fardon*,[10] in a passage which the appellant relied on, as:

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9 *Attorney-General for the State of Qld v Harvey* [2013] QSC 125.

10 [2013] QCA 64.

> "enabling the parties and the public to understand the judge's reasons for making such an order so as to provide 'the foundation for the acceptability of the decision by the parties and by the public', the facilitation of appeals and the creation of a record which may assist the prisoner and the appropriate authorities, including the Attorney-General, in further applications under the Act and generally in the prisoner's management, treatment and rehabilitation."[11]

[35] It was submitted that the primary judge had done no more than to outline parts of the evidence of the psychiatrists and Ms Lindley and reach the conclusions in paragraphs [39] to [43]. He had not identified the "important conditions" that the appellant would breach; indicated the basis on which he concluded that adequate protection of the community could not be achieved with a supervision order; or explained why he concluded that the appellant would resent and resist the restrictions of a supervision order or the significance of that conclusion. Nor, it was said, had his Honour explained why he did not accept the psychiatric evidence. That evidence was said to be that if the appellant breached the order the breaches would be ones which merely tested the limits and would be generally of a minor nature, while any frustration and anger resulting from a supervision order could be managed by appropriate intervention on a supervision order.

[36] In my view, those submissions are ill-founded. The primary judge set out his reasoning. He identified the risk that the appellant would use cannabis with resulting disinhibition, something which an electronic monitoring device would not prevent. The extreme violence of the assault on Ms Hawkins was relevant to the risk of sexual re-offending. He preferred the opinions of Dr Lawrence and Dr Moyle, noting that while both accepted that a supervision order would reduce the high risk of the appellant's re-offending, there was a caveat as to whether he could comply with such an order. His Honour went on to identify the personal characteristics of the appellant which suggested that he would not, and the practical defects in the appellant's proposed release plan. The likelihood of the respondent's resenting and resisting the constrictions of a supervision order followed logically from what his Honour had recorded immediately before, concerning the appellant's personality traits.

[37] The "important conditions" likely to be breached were clear enough. Immediately before that reference, his Honour had adverted (at [41]) to the risk of the appellant's committing sexual offences and also of engaging once more in the sort of conduct in which he had engaged two months after being released previously. That conduct was described more fully earlier in the judgment (at [35]) as the use of cannabis, with its disinhibiting effect.

[38] The contention that Martin J did not accept the psychiatrists' evidence fails because the premise as to the effect of that evidence is not made out. It was not that any breaches would be minor and the appellant's responses manageable. Dr Lawrence expressed the view that the appellant would be "inclined to test the limits of [the supervision order] conditions" and that she expected that there "could well be at least minor breaches because of [the appellant's] anti-social...nature and anti-authoritarian nature." Her opinion was that the appellant presented a high risk of re-offending if released without a supervision order, but that such an order with appropriate conditions could "reduce the likelihood of serious re-offending, particularly of a sexual kind" to "moderate or moderately high".

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[11] [2013] QCA 64 at [84].

[39] Dr Moyle said that any supervision order would be difficult to implement and difficult to enforce because the appellant would "test the limits". He observed that most of the appellant's past breaches were relatively minor, while the major breaches were his cannabis use and the assault on Ms Hawkins. He described the major breaches as "most concerning". The appellant was one of a group more likely to offend with general violence than sexual violence, but the concerning factor was the escalating level of violence which he had exhibited. Dr Moyle, like Dr Lawrence, considered that the level of risk of sexual offending without a supervision order was high; any supervision order would require very tight monitoring and control.

[40] Professor Morris, like Dr Moyle, observed that the appellant's past breaches, other than the assault and the cannabis use, were "fairly minor" and that the appellant did "test the limits". His opinion was that the appellant posed a "moderate risk" which could be further reduced if he were placed on a supervision order. None of the psychiatrists expressed the view that any future breaches by the appellant would be of a minor nature. They did refer to the appellant's testing the limits, but that was hardly cause for comfort.

[41] Dr Lawrence confirmed the importance of therapeutic intervention and involvement in the sexual offender's treatment program, but noted that the appellant had previously flouted the opportunity to undertake therapy, and the risk of his doing so again remained. She expressed reservations as to what change could be achieved. Dr Moyle said that he did not know whether the appellant's personality traits could be dealt with by therapy, although it had to be offered. He expressed himself particularly concerned about the appellant's failure to commit to abstain from alcohol use or indicate that he would co-operate with those supervising and monitoring him. Professor Morris expressed the view that counselling would reduce the risk of the appellant's breaching the supervision order. He had some confidence that he would engage in the process, because on some previous occasions he had participated in counselling. None of the psychiatrists' evidence went as far as saying that the appellant's "frustration and anger" could be managed by intervention. The two psychiatrists whose opinions were accepted by the primary judge were distinctly pessimistic about what could be achieved.

"Adequate protection of the community"

[42] The appellant asserted that the *Attorney-General for the State of Queensland v WW*[12] and *Attorney-General for the State of Queensland v Ellis*[13] established that the DP(SO)A did not prohibit a supervision order where the court considered that the prisoner might breach one or more of its requirements, if such a breach were likely to be detected by supervising officers. *Ellis* was also said to be authority for the proposition that non-compliance or unwillingness to comply with a supervision order was not a basis on which to rescind it. Oddly, the particular passage to which counsel referred was this:

> "It would be a strange result if a person could be released under a supervision order when all the evidence pointed to the high likelihood that it would be breached in its important conditions virtually as soon as the prisoner was released".[14]

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12 [2007] QCA 334.
13 [2012] QCA 182.
14 [2012] QCA 182 at [91].

It was said that the primary judge had failed to consider the question of adequate protection in accordance with those principles.

[43] It may be accepted that the prospect of a breach which is likely to be detected before the commission of a serious offence is not necessarily conclusive against the making of a supervision order. How the prospect of breach bears on the risk of serious sexual offending must be a question of fact in any given case, having regard to factors including the nature of the likely breach, the circumstances in which it might occur and the evidence as to the likelihood of its timely detection. In this case, the primary judge made it clear that he was concerned about the risk that the appellant would use cannabis again; that electronic monitoring was unlikely to detect it; and that the disinhibiting influence of the substance magnified the risk of further offending.

[44] The passage from *Ellis* referred to does not support the proposition that non-compliance or unwillingness to comply with an order cannot constitute of itself a basis on which to rescind a supervision order. Again it must be a question of fact; but where there has been a contravention or likely contravention of an order, the onus falls on the prisoner to satisfy the court that adequate protection can be achieved by the existing order. Plainly, if that onus is not met because the prisoner is unwilling to commit to compliance, the contravention or likely contravention will provide a basis for rescission.

[45] In any event, that is not this case. The learned judge concluded, for the reasons he gave, that the appellant remained a risk of re-offending sexually; that the conditions of the supervision order would not necessarily prevent him from engaging in cannabis use with the effect of disinhibiting him; and that there was a likelihood of the specified breaches of the supervision order, so that it could not ensure adequate protection. The appellant has not demonstrated any error in that reasoning.

Orders

[46] I would:

(1) refuse the application for an extension of time in Appeal No 9444/13;

(2) dismiss the appeal in Appeal No 6420/12; and

(3) dismiss the appeal in Appeal No 5269/13.

[47] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.

[48] **ANN LYONS J:** I agree with her Honour's reasons and in particular I consider that the evidence before the learned primary judge in relation to the preliminary question of whether the appellant assaulted Ms Hawkins was of such a nature that it justified the finding that he had assaulted her. In my view his Honour carefully considered all of the evidence and that there was ample reason for him ultimately to be satisfied that whilst Ms Hawkins s 92 statement was susceptible to some criticism, he could be satisfied that the appellant did assault her in the way she had described given it was supported by the video evidence, the appellant's motive to attack her, the fact he changed his clothing, his lies and the other circumstantial evidence, all of which he carefully analysed. His Honour was clearly conscious of the relevant standard of proof and his finding was not against the weight of evidence or unreasonable.

[49] I therefore consider that there was clear evidence that he had breached condition 12 of the supervision order that he not commit an indictable offence during the period of the order. I also agree that whilst such a condition would generally not be a necessary condition in most supervision orders there may be circumstances where it would be required and that it could therefore be imposed.

[50] I would also reject any argument that the reasons given by Martin J were in any way inadequate. I consider that the reasons amply illustrate the basis for the conclusion reached that the appellant remained a high risk of reoffending sexually and that the proposed conditions were not such as to ensure the adequate protection of the community.

[51] I agree with the orders proposed.