SUPREME COURT OF QUEENSLAND

CITATION:	*R v SCZ* [2018] QCA 81
PARTIES:	**R** **v** **SCZ** (applicant)
FILE NO/S:	CA No 288 of 2017 SC No 1188 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 14 November 2017 (Dalton J)
DELIVERED ON:	4 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2018
JUDGES:	Morrison and Philippides JJA and Davis J
ORDERS:	**1. The application to adduce further evidence be allowed and the Court receive into evidence on the application for leave to appeal against sentence the report of psychologist, Sara Jones.** **2. Leave to appeal against sentence is granted.** **3. The appeal against sentence is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – FRESH EVIDENCE AND EVENTS OCCURRING AFTER SENTENCE – where the applicant pleaded guilty to possession of a dangerous drug and received a court ordered parole order – where the applicant sought at the sentence hearing to tender a psychologist's report – where the sentencing judge asked if the report diagnosed the applicant with any mental illnesses and the applicant's counsel indicated it did not – where the sentencing judge refused the tender of that report – where the report in fact set out symptoms consistent with mental illnesses – where the applicant alleges that that the imposition of parole instead of a suspended sentence of imprisonment was an error – whether the psychologist's report should have been accepted and whether a suspended sentence of imprisonment should have been imposed instead *Corrective Services Act* 2006 (Qld), s 199, s 200, s 201, s 205, s 206

Penalties and Sentences Act 1992 (Qld), s 9, s 144, s 146, s 147, s 160B

Crump v New South Wales (2012) 247 CLR 1; [2012] HCA 20, cited
Elliott v The Queen (2007) 234 CLR 38; [2007] HCA 51, cited
R v Bowen [1997] 2 Qd R 379; [1996] QCA 479, cited
R v Holcroft [1997] 2 Qd R 392; [1996] QCA 478, cited
R v Holley; ex parte Attorney-General (Qld) [1997] 2 Qd R 407; [1996] QCA 480, cited

COUNSEL: R N O'Gorman for the applicant
M J Wilson for the respondent

SOLICITORS: Fisher Dore Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I agree with the reasons of Davis J and the orders his Honour proposes.

[2] **PHILIPPIDES JA:** I agree with Davis J.

[3] **DAVIS J:** The applicant seeks leave to appeal against a sentence of 18 months' imprisonment subject to immediate release on court ordered parole[1] imposed upon her on 14 November 2017 in the Trial Division. The sentence was imposed after the applicant had, on 8 November 2017, pleaded guilty to an amended indictment charging her with one count, namely, "That on the 13th day of June 2015 at Oxley in the State of Queensland [the applicant] unlawfully had possession of the dangerous drug methylamphetamine".

[4] That is an offence against s 9(1)(d) of the *Drugs Misuse Act* 1986 (Qld) and carries a maximum sentence of 15 years' imprisonment. Originally the indictment alleged a circumstance of aggravation that the quantity of the drug exceeded 2 grams. By force of s 9, that circumstance of aggravation raised the maximum penalty to 25 years.[2] When the circumstance of aggravation was, by amendment, removed from the indictment the applicant pleaded guilty to the amended charge. The Crown accept on sentence and on appeal that in those circumstances the applicant's plea was a timely one. The learned sentencing judge proceeded on that basis.

[5] The applicant's complaint is not with the sentence of 18 months' imprisonment; she submits that the offence should not have attracted a parole release order, but instead the sentence of imprisonment should have been wholly suspended pursuant to s 144 of the *Penalties and Sentences Act* 1992 (Qld) (*Penalties and Sentences Act*).

[6] The grounds of the application for leave to appeal sentence as they appear in the application are:

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1 Pursuant to *Penalties and Sentences Act* 1992 (Qld) s 160B; *Corrective Services Act* 2006 (Qld) s 199.

2 *Drugs Misuse Act* 1986 (Qld) s 9(1)(b); *Drugs Misuse Regulation* 1987 schs 1 and 3. There is no suggestion here of the applicant being a drug dependant person for the purposes of s 9(1)(b) of the *Drugs Misuse Act*.

"(i) The sentencing judge erred in not receiving the psychological report prepared for use at the sentence;

(ii) As a result of the matter raised by ground 1, and in any event, the sentencing judge erred in imposing a parole release date rather than wholly suspending the sentence; and

(iii) The sentence was manifestly excessive."

[7] The psychological report referred to in ground 1 is a report by clinical psychologist Ms Sara Jones and is a report of an assessment of the applicant conducted on 6 December 2016 (the psychologist's report).

[8] On the hearing of the appeal, the applicant abandoned ground 3 and restated ground 2. As to ground 2, counsel identified what she submitted were two incorrect factual findings and then submitted that the decision to release the applicant on parole (as opposed to suspending the sentence) was made in reliance upon the two alleged factual errors and in the context of the refusal to accept the tender of the psychologist's report. Counsel submitted that proof of either of the two factual errors was sufficient to make out ground 2, even if it was not found that the tender of the psychologist's report was wrongly refused.

[9] The two alleged factual errors are:

(i) "She's living a lifestyle where she's involved with people who are outside the law";[3] and

(ii) "[I]t won't trouble her to be on parole".[4]

[10] The applicant faces an obvious difficulty with ground 2, as the "findings" the subject of complaint are not findings at all, but merely comments made by the primary judge in the course of argument.

[11] There was no application to amend ground 2, but no point was taken by the Crown and the application proceeded on the basis of ground 1 and ground 2 as restated.

[12] The applicant has also applied for leave to adduce fresh evidence, namely the psychologist's report, on the application for leave to appeal the sentence. The point of tendering the psychologist's report is so that this Court can assess whether the sentencing process miscarried by virtue of the refusal of the learned sentencing judge to accept the tender of the report. If a ground of the application is made out and this Court resentences the applicant, the applicant seeks to have the psychologist's report considered on sentence.

Circumstances of the offending

[13] The offence came to light as a result of a police operation called "Mike Tyras". One of the many targets of that operation was a person, JCA. While tracking the activities of JCA, the police identified the applicant and two of her adult sons, SL and KSG.

[14] SL was a customer of JCA. JCA would supply methylamphetamine to SL and he would on-sell it to his customers.

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3 Primary decision: Appeal record book at 22.

4 Ibid.

[15] As some point before 6 May 2015, SL was arrested by police. By this stage, he was indebted to JCA for drugs sold to him on credit.

[16] SL then introduced JCA to his brother, KSG and to the applicant.

[17] For a time, JCA supplied KSG with methylamphetamine. Then, on 6 May 2015, KSG was arrested and charged with trafficking in methylamphetamine. He was released on bail.

[18] On 13 June 2015, there was a meeting between JCA and the applicant at a McDonald's restaurant in Oxley. The applicant purchased 1 ounce of methylamphetamine from JCA.

[19] Later, in September 2015, police seized an Apple iPhone belonging to the applicant. That was analysed. The analysis showed that on 29 April 2015 the applicant had sent a text to JCA about money that he had advanced to her "to move with". The clear inference is that JCA had lent money to the applicant so that she could buy drugs and sell the drugs to others.

[20] The iPhone showed that on 26 May 2015, a few weeks after the arrest of KSG, the applicant and JCA had a telephone conversation where the applicant told JCA that she did not want KSG "brought into anything anymore". JCA said that they would "hold off" until SL was released from prison. The inference there is that given that KSG was now on bail, the applicant did not want him involved in transactions with JCA. It seems to be common ground that the applicant was assisting KSG in his ongoing drug business.

[21] Then, on 10 June 2015, the applicant and JCA spoke on the telephone; she inquired if she could get "one", which, it seems to have been accepted, is a reference to one ounce of methylamphetamine. There was a discussion as to how the drug was to be paid for and JCA and applicant met three days later on 13 June 2015, when JCA supplied the applicant with one ounce of methylamphetamine.

[22] JCA and the applicant were not intercepted on 13 June 2015. The drug that was supplied on that day by JCA to the applicant was not seized or analysed. Therefore, there was no opportunity for the police to identify what pure methylamphetamine was contained in the one ounce of powder that was supplied by JCA to the applicant. As a result, the Crown had no evidence to prove the circumstance of aggravation which was originally charged on the indictment. That explains the amendment to the indictment.

[23] At the sentencing hearing, there were submissions made by defence counsel as to the proper categorisation of the applicant's possession of the drug. This exchange occurred between her Honour and counsel who appeared for the applicant:

"HER HONOUR:	Okay. Does – do you accept … that it's commercial possession?
COUNSEL:	It's accepted that it's commercial possession by KSG.
HER HONOUR:	Who's KSG?
COUNSEL:	I'm sorry. KSG, the - - -

HER HONOUR: Her son.

COUNSEL: Her son and the person for whom she was receiving the drugs. And I understand that is the Crown's case."

[24] A little later counsel said:

"COUNSEL: When he [KSG] was arrested on the 6th of May 2015 I understand that he was granted bail at that time and he remained in the community and the trafficking relates to his selling of those drugs. That's not a matter that this defendant, Ms SCZ, is charged with but she did, on the 13th of June 2015, obtain drugs from Mr JCA and provide them to Mr KSG, who presumably did go on to sell those drugs, although I don't know the details of his trafficking."

[25] The exchange continued later:

"HER HONOUR: She doesn't – she doesn't have them [a reference to the drug] for any purpose except a commercial purpose.

COUNSEL: That's so. She provided them to her son, KSG - - -

HER HONOUR: So that he could continue - - -

COUNSEL: - - - knowing – yes.

HER HONOUR: - - - his big brother's business of drug trafficking.

COUNSEL: Yes."

This frankly appears to be an admission to trafficking or at least supply of dangerous drugs. However, the present applicant was not charged with supply of dangerous drugs[5] constituted by any actual physical supply of methylamphetamine to Mr KSG; nor was she charged with supply of methylamphetamine to Mr KSG based on any deemed supply constituted, for instance, by the acquisition of the drug from JCA with a view to passing it on to Mr KSG.[6] She is also not charged with being a party to his trafficking.[7]

[26] The question though which was relevant to sentence was whether the possession was for personal use or a broader commercial purpose. Her Honour found that the possession was for a commercial purpose which, given the evidence and the submissions and ultimate concession by defence counsel, was inevitable.

Ground 1: The refusal of the judge to accept the psychologist's report

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5 The offence contained in *Drugs Misuse Act* 1986 (Qld) s 6.

6 See *Drugs Misuse Act* 1986 (Qld) s 4, definition of "supply".

7 The offence contained in *Drugs Misuse Act* 1986 (Qld) s 5; *Criminal Code* (Qld) s 7.

[27] At the beginning of her submissions on sentence, counsel sought to tender the psychologist's report. Her Honour questioned counsel as to the relevance of the report. The following exchange then occurred:

> "COUNSEL: As your Honour has heard, Ms SCZ is now 53 years of age. A report has been prepared by a psychologist, Sara Jones. I can tender that report. I'm not sure if your Honour has had the opportunity to read that yet.
>
> HER HONOUR: I haven't had the opportunity to read it, but what - - -
>
> COUNSEL: Might I tender that?
>
> HER HONOUR: Well, is it relevant? What's rel – is it – what's the relevance of it?
>
> COUNSEL: In my submission, the most assistance that your Honour would obtain from reading it is that Ms SCZ does have a very complex and traumatic set of antecedents, and they are set out quite neatly and helpfully in the report. If your Honour didn't wish to receive the report predominantly for that purpose - - -
>
> HER HONOUR: Well - - -
>
> COUNSEL: - - - then I can take your Honour through it.
>
> HER HONOUR: - - - it's just that – it's Legal Aid, isn't it? They essentially brief out the taking of – I mean, I don't mind at all if there is actually some condition which the defendant suffers from that is within the expertise of a psychologist to report to the court on, but it's – otherwise, it's just used for Legal Aid to brief out the taking of the factual case, that I think is an abuse, quite frankly. And it's – because they're put together by people that aren't lawyers – I haven't read this, but they say all sorts of things which a lawyer would know not to say, you know, about how it would be terrible to send the person to jail and things like that. Here it is. Which:
>
> > It's recommended whatever sentence option be delivered to Ms SCZ that she be afforded the opportunity to engage in therapy.
>
> Which is sort of – the person writing doesn't understand my job, do they? So

does the psychologist diagnose Ms SZC with anything?

COUNSEL: **No, there's no diagnosis provided in the report. Really, as far as observations go, along those lines, it's set out at page 11 – the very bottom of page 11, which talks about the writer's recommendation that Ms SCZ would benefit from therapy moving forwards, but also - - -**

HER HONOUR: But - - -

COUNSEL: - - - I suppose - - -

HER HONOUR: But that's not - - -

COUNSEL: If your Honour - - -

HER HONOUR: I just – so what's it rel – what – I can't order therapy.

COUNSEL: No.

HER HONOUR: So it's terrific that a psychologist thinks that she'd benefit from therapy, but it's sort of irrelevant, isn't it? **So is there anything in here that is relevant to what I'm doing, and is it just the facts, because you can tell me that.**

COUNSEL: I can.

HER HONOUR: So is – shall I give it back? Is there anything – I know it's just a bit of a bugbear of mine, but I'm not alone and it's – I just think it's an enormous waste of Legal Aid money. It just feeds an industry, and rather than the lawyers doing their job – I'm assuming it's Legal Aid here, am I correct?

COUNSEL: This matter is legally aided.

HER HONOUR: Yes. And the psychologists are paid almost nothing to do a job that isn't relevant to my task.

COUNSEL: **Well, I suppose at the time that the matter is sent to the psychologist, in particular in relation to this matter, instructions had been taken about Ms SCZ's background that gave rise to a real concern that there might be some underlying issues of a psychological nature that should be explored.**

HER HONOUR: **All right. But then – but none were found.**

COUNSEL: **Certainly some were found, and links are drawn by Ms Jones between matters that occurred to Ms SCZ at the hands of violent men in her past and her motivation or acquiescence in the offending in this present case, but those are matters, ultimately, that I would be making submissions upon in any event.**

HER HONOUR: Well, I'll hand it back."[8] (my emphasis)

[28] It can be seen that her Honour questioned counsel attempting to ascertain the relevance of the report. Her Honour was particularly interested in whether the psychologist had diagnosed any psychological disorders. Counsel told her Honour that apart from recording antecedents, the psychologist found some psychological links between the applicant's experience in violent relationships and the offending. However, counsel did not really press the tender on that basis. She said of those things, "those are matters, ultimately, that I would be making submissions upon in any event". Her Honour obviously took that to mean that those submissions could be made without reference to any expert report.

[29] Given what her Honour was told by counsel, her Honour could conclude that the report added nothing to the sentencing process and that it was within her Honour's discretion to refuse tender of the report.

[30] However, the psychologist did make diagnoses of Posttraumatic Stress Disorder and Major Depressive Disorder or, depending on how the report is to be interpreted, at least identified symptoms and factors consistent with those disorders. In this respect, the report stated:

> "Ms SCZ reported a long-standing history of domestically violent relationships. More recently she experiencing a large amount of intrusive reactions related to various traumas, especially those related to flashback to the 'large men with guns' approaching her house to find KSG. These reactions included: general hypervigilance to signs of threat, elevated stress levels, persistent recollections of the events, some dissociative reactions (i.e. flashbacks of the events), and if triggered by something, she would experience a heightened anxiety response. The physical effects of anxiety being features of the fight and flight response (i.e. accelerated heartbeat, hyperventilation, severe muscular tensions); as well as other features of this reaction being: feeling of losing control, feeling of impending doom. **Given Ms SCZ's history of sexual, physical and emotional abuse throughout her life, and her more recent reaction to her son's behaviours and the 'large men' searching for him; her presentation is consistent with a Diagnosis of Posttraumatic Stress Disorder.** This is based on the features of her reactions as outlined above - but more specifically that she reported features of

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[8] Appeal record book at 16–18.

> recurrent intrusive and distressing memories of the assaults, recurrent and persistent nightmares of the events, dissociative reactions (i.e. flashbacks), and marked increases in anxiety and fear when in the presence of triggers of the events. **Furthermore, Ms SCZ reported a long-standing dysphoria (i.e. low mood) and her most recent presentation, met criteria for Major Depressive Disorder, moderate, recurrent.** It is likely that the impact of these traumas, both recent and historical, changed Ms SCZ's perceptions of the world, her safety in the world (including physical and emotional safety), and affected her behaviours. It is likely that she formed opinions that to protect herself against further injures, she would become compliant to others demands. While this may have reduced her changes of injury herself, if may have in effect left her more vulnerable to the influence of others."[9] (my emphasis)

[31] It can be seen that the psychologist opined that the two clinically identified psychological disorders (or at least the identified symptoms of those disorders) were relevant to the applicant's tendency to comply with the will of others. Given other submissions made by counsel on the applicant's behalf, the psychologist's findings were directly relevant to the applicant's criminality and therefore relevant to sentence. Her Honour, based on what she had been told, and therefore believing that the psychologist's report was irrelevant, excluded it and thereby excluded relevant evidence which the applicant was entitled to have considered.

[32] I would allow the application to adduce evidence of the psychologist's report on the appeal. I find that ground 1 of the application has been made out.

Ground 2: The alleged factual errors

[33] As already mentioned, the statements made by her Honour which are the subject of complaints were not findings, but comments made in the course of argument. Further, there is no point in considering whether her Honour erred in imposing the sentence she did upon the evidence which was before her when I have concluded that the psychologist's report ought to have been received.

[34] It is necessary to resentence the applicant based on the material before the learned sentencing judge, supplemented by the psychologist's report.

Statutory context

[35] On appeal, the Crown sought to maintain the sentence that had been imposed. There was no suggestion that if this Court resentenced the applicant the result ought to be that she immediately serve a term of actual custody. The applicant has not submitted to this Court that the sentence ought not be one of imprisonment; the applicant submits that the sentence should be wholly suspended. In all the circumstances, a sentence of 18 months imprisonment coupled with orders resulting in the applicant not serving any part of the term unless in breach of further orders is the appropriate outcome. The real issue for this Court is whether an order releasing the applicant immediately on parole ought to be made, or whether the sentence should be wholly suspended.

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[9] Affidavit of Kristy Adele Bell, filed 15 March 2018 exhibit KAB-01: Pre-Sentencing Report of Ms SCZ at 10–11 ll 317–339. There appear to be some typographical errors in this passage.

[36] In Queensland there are two mechanisms by which a sentenced prisoner may be released on parole. The first is by order of the Parole Board Queensland[10] (the Parole Board) or by a Regional Parole Board.[11] In such a case, while the court imposing the sentence has the jurisdiction to set a date upon which a prisoner is eligible for parole,[12] the decision to release the prisoner on parole is an exercise of executive, not judicial power.[13] Upon sentence being imposed by the court "[the] controversy represented by the indictment [has] been quelled and, allowing for any applicable statutory regime, the responsibility for the future of the [prisoner] passe[s] to the executive branch of the government of the State."[14]

[37] Court ordered parole, being the second mechanism for release on parole in Queensland is a relatively recent invention.[15] By this regime, the sentencing court, not the executive, orders the release of the prisoner on parole.[16] The only function of the executive in the release of the prisoner on parole is that it is the Chief Executive who formally issues a parole order in obedience of the court's order.[17] It is clear that once the parole order is made by the court, supervision of the prisoner on parole is the province of the executive.

[38] The conditions of both parole granted by the parole board (or a regional board) and court ordered parole are as prescribed by s 200 of the *Corrective Services Act* 2006 (Qld) (*Corrective Services Act*). That is in these terms:

> "**200 Conditions of parole**
>
> (1) A parole order[18] must include conditions requiring the prisoner the subject of the order—
>
> (a) to be under the chief executive's supervision—
>
> (i) until the end of the prisoner's period of imprisonment; or
>
> (ii) if the prisoner is being detained in an institution for a period fixed by a judge under the *Criminal Law Amendment Act 1945*, part 3—for the period the prisoner was directed to be detained; and
>
> (b) to carry out the chief executive's lawful instructions; and
>
> (c) to give a test sample if required to do so by the chief executive under section 41; and

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10 *Corrective Services Act* 2006 (Qld) ch 5, pt 2, div 1 establishes the Parole Board Queensland.

11 *Corrective Services Act* 2006 (Qld) ch 5, pt 2, div 2 allows the establishment of Regional Parole Boards by regulation: s 230.

12 *Penalties and Sentences Act* 1992 (Qld) s 160B.

13 C*rump v New South Wales* (2012) 247 CLR 1 at [28].

14 *Elliott v The Queen* (2007) 234 CLR 38 at [5]

15 *Penalties and Sentences Act* 1992 (Qld) pt 9, div 3, inserted by *Corrective Services Act* 2006 (Qld) s 497, as passed on 1 June 2006.

16 *Penalties and Sentences Act* 1992 (Qld) s 160B and *Corrective Services Act* 2006 (Qld) s 199

17 *Corrective Services Act* 2006 (Qld) s 199.

18 "Parole order' includes court ordered: *Corrective Services Act* 2006 (Qld) sch 4, definition of "parole order".

(d) to report, and receive visits, as directed by the chief executive; and

(e) to notify the chief executive within 48 hours of any change in the prisoner's address or employment during the parole period; and

(f) not to commit an offence.

(2) A parole order may contain a condition requiring the prisoner to comply with a direction given to the prisoner under section 200A.[19]

(3) A parole order granted by the parole board may also contain conditions the board reasonably considers necessary—

(a) to ensure the prisoner's good conduct; or

(b) to stop the prisoner committing an offence.

Examples—

- a condition about the prisoner's place of residence, employment or participation in a particular program
- a condition imposing a curfew for the prisoner
- a condition requiring the prisoner to give a test sample

(4) The prisoner must comply with the conditions included in the parole order."

[39] Consistently with the obvious policy that the executive controls prisoners on parole, s 200 vests broad powers of supervision in the Chief Executive which are exercised in practice by Corrective Services officers. The Chief Executive has the power to amend or suspend a parole order (including court ordered parole).[20] The Parole Board, too, has the power to amend or suspend a parole order (including a court ordered parole order) and it also has the power to cancel a parole order.[21]

[40] If parole is suspended or cancelled, the prisoner is taken into custody.[22] By s 209 of the *Corrective Services Act*, parole is automatically cancelled if the prisoner is sentenced to another period of imprisonment for an offence committed during the period of parole.

[41] The *Penalties and Sentences Act* provides that the whole or part of any sentence of imprisonment of five years or less may be suspended[23] for an operational period set by the sentencing court.[24] If an offence is committed during the operational period then s 146 is triggered. Sections 146 and 147 are as follows:

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19 Section 200A concerns tracking devices and is not relevant here.
20 *Corrective Services Act* 2006 (Qld) s 201.
21 *Corrective Services Act* 2006 (Qld) s 205.
22 *Corrective Services Act* 2006 (Qld) s 206.
23 Section 144.
24 Section 144.

"**146 Consequences of committing offence during operational period**

(1) A court must proceed under this section if—

(a) the court—

(i) convicts an offender of an offence for which imprisonment may be imposed; and

(ii) is satisfied that the offence was committed during—

(A) the operational period of an order made under section 144; or

(B) an extension of the operational period ordered under section 147(1)(a)(i); or

(C) a further stated operational period ordered under section 147(1)(a)(ii)(B); or

(b) an offender is otherwise before the court and the court is satisfied that—

(i) the offender was convicted, in or outside Queensland, of an offence for which imprisonment may be imposed; and

(ii) the offence was committed during—

(A) the operational period of an order made under section 144; or

(B) an extension of the operational period ordered under section 147(1)(a)(i); or

(C) a further stated operational period ordered under section 147(1)(a)(ii)(B).

(2) If the court mentioned in subsection (1) has like jurisdiction to the court that made the order, the first court must deal with the offender under section 147 for the suspended imprisonment.

(2A) If the court mentioned in subsection (1) is of higher jurisdiction than the court that made the order, the first court must deal with the offender under section 147 for the suspended imprisonment unless the court considers that it would be in the interests of justice for the offender to be dealt with under section 147 by the court that made the order.

(2B) If, under subsection (2A), the first court does not deal with the offender under section 147 for the suspended imprisonment, it must—

(a) commit the offender to custody to be brought; or

(b) grant bail to the offender conditioned to appear;

before a court of like jurisdiction to the court that made the order.

(3) If—

(a) the order was made by a court other than a Magistrates Court; and

(b) the court mentioned in subsection (1) is a Magistrates Court;

the Magistrates Court must proceed under subsection (4).

(4) The Magistrates Court mentioned in subsection (3) must—

(a) commit the offender to custody to be brought; or

(b) grant bail to the offender conditioned to appear;

before a court of like jurisdiction to the court that made the order.

(5) If—

(a) the order was made by the Supreme Court; and

(b) the court mentioned in subsection (1) is a District Court;

the District Court must proceed under subsection (6).

(6) The District Court mentioned in subsection (5) must—

(a) commit the offender to custody to be brought before the Supreme Court; or

(b) grant bail to the offender conditioned that the offender appear before the Supreme Court.

(7) If the offender comes before a court under subsection (2B), (4) or (6), the court must deal with the offender under section 147 for the suspended imprisonment.

147 Power of court mentioned in s 146

(1) A court mentioned in section 146(2), (2A), (4) or (6) that deals with the offender for the suspended imprisonment may—

(a) order—

(i) that the operational period be extended for not longer than 1 year; or

(ii) if the operational period has expired when the court is dealing with the offender—

(A) that the offender's term of imprisonment be further suspended; and

(B) that the offender be subject to a further stated operational period of not longer than 1 year during which the offender must not commit another offence punishable by imprisonment if the offender is to avoid being dealt with under section 146 for the suspended imprisonment; or

(b) order the offender to serve the whole of the suspended imprisonment; or

(c) order the offender to serve the part of the suspended imprisonment that the court orders.

(2) The court must make an order under subsection (1)(b) unless it is of the opinion that it would be unjust to do so.

(3) In deciding whether it would be unjust to order the offender to serve the whole of the suspended imprisonment the court must have regard to—

(a) whether the subsequent offence is trivial having regard to—

(i) the nature of the offence and the circumstances in which it was committed; and

(ii) the proportion between the culpability of the offender for the subsequent offence and the consequence of activating the whole of the suspended imprisonment; and

(iii) the antecedents and any criminal history of the offender; and

(iv) the prevalence of the original and subsequent offences; and

(v) anything that satisfies the court that the prisoner has made a genuine effort at rehabilitation since the original sentence was imposed, including, for example—

(A) the relative length of any period of good behaviour during the operational period; and

(B) community service performed; and

(C) fines, compensation or restitution paid; and

(D) anything mentioned in a pre-sentence report; and

(vi) the degree to which the offender has reverted to criminal conduct of any kind; and

(vii) the motivation for the subsequent offence; and

(b) the seriousness of the original offence, including any physical or emotional harm done to a victim and any damage, injury or loss caused by the offender; and

(c) any special circumstance arising since the original sentence was imposed that makes it unjust to impose the whole of the term of suspended imprisonment.

(4) If the court is of the opinion mentioned in subsection (2), it must state its reasons.

(5) In this section—

original offence means the offence for which a term of imprisonment has been suspended under section 144(1).

original sentence means the sentence imposed for the original offence.

subsequent offence means the offence committed during—

(a) the operational period of an order made under section 144 for the original offence; or

(b) an extension of the operational period ordered under section 147(1)(a)(i) for the original offence; or

(c) a further stated operational period ordered under section 147(1)(a)(ii)(B) for the original offence."

[42] While a court has a discretion under s 147 not to order the imprisonment of the applicant where there has been a further offence committed during the operational period, that discretion is limited by s 147(2). Unless, by reference to the factors identified in s 147(3), the court forms the opinion that it is "unjust" to order the offender to serve the whole of the suspended sentence in prison, the court must make such an order.[25]

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[25] See *R v Bowen* [1997] 2 Qd R 379; *R v Holcroft* [1997] 2 Qd R 392; *R v Holley; ex parte Attorney-General (Qld)* [1997] 2 Qd R 407.

[43] The major practical distinction between an offender being released on court ordered parole or being released on a suspended sentence is the power of supervision vested in the executive where the prisoner is on parole. In addition, while a suspended sentence may only be breached by commission of a further offence during the operational period, a breach of parole may be committed upon a breach of any of the conditions prescribed by s 200 of the *Corrective Services Act* or by a failure to comply with directions given pursuant to those conditions. Imprisonment for an offence committed during a parole period automatically results in the prisoner being taken into custody. Commission of an offence during the operational period of a suspended sentence does not. The prisoner may argue that it is unjust to activate the sentence, although in practical terms it would be unlikely that the suspended sentence would not, at least in part, be activated.

The appropriate sentence

[44] I have already set out the circumstances of the commission of the offence to which the applicant pleaded guilty. Counsel for the applicant, in submitting that the appropriate course was to suspend the sentence rather than make a parole order, relied heavily upon the applicant's history and personal circumstances.

[45] The applicant was born on 4 April 1964. She was therefore 51 at the time of the commission of the offence and she has just turned 54. She is of Indigenous Australian descent.

[46] The applicant had a difficult childhood, at some point being in State care. At the age of 16, she was the subject of a serious sexual assault. Her first child was born of that assault.

[47] Over the following years, the applicant had a series of relationships, through which she bore several children. Her second child, KS, was born into a dysfunctional, violent relationship. Ultimately, KS's father murdered him.

[48] KSG is the applicant's third child. The applicant considered her relationship with KSG's father to be a functional one. KSG's father was killed in a caravan fire. She then commenced another relationship which was characterised by domestic violence. Two children born of that relationship died soon after birth but the relationship produced four children who have survived; SL, and three others. Upon the breakdown of that relationship, she entered into her current relationship which has produced a child who I will refer to as SJ. He is currently 13 years of age.

[49] KSG has severe mental health problems and has been diagnosed with schizophrenia. He has been violent to family members, including the applicant. The applicant has attempted to distance herself from KSG and has the benefit of a domestic violence order against him.

[50] The applicant presently resides with her three youngest children, including SJ.

[51] SJ has significant health issues. The applicant is his full-time carer. He is schooled at home and a social worker visits the family to assist with SJ's education and the control of his behavioural issues.

[52] The applicant has a criminal history, which commenced in January 1986 when she was 21 years of age. She was convicted at that time of unlawful use of a motor vehicle in the Townsville Magistrates Court and released upon a good behaviour

bond. In 2001, 2008 and 2012, she was convicted of minor dishonesty offences. In the Ipswich Magistrates Court on 23 March 2015, the applicant was convicted of unlawfully possessing weapons and explosives. There is no evidence as to the particulars of that offending but the court's response was a moderate fine.

[53] Of more significance is that on 29 August 2016 the applicant was convicted in the Ipswich Magistrates Court of an offence of deprivation of liberty,[26] which occurred on 27 December 2015. She was sentenced to a term of imprisonment of two months, wholly suspended for an operational period of 12 months. This was an odd incident. The complainant was a young woman who was romantically involved with one of the applicant's sons. The applicant's partner and one of her sons pulled the complainant into a car. The applicant was sitting in the passenger seat and played no active role. She was convicted as an aider, presumably on the basis that her presence gave encouragement to the primary offenders.[27] The applicant's explanation for the current offence is that when her son SL was taken into custody and KSG was himself arrested and bailed, she was asked by KSG to assist him in conducting what was SL's business of trafficking in drugs. The applicant agreed through fear generated by KSG's violent disposition.

[54] On appeal, counsel for the applicant submitted that the making of a parole order (as opposed to a suspended sentence) was inappropriate because the applicant could not comply with the conditions of parole given the burden in caring for SJ. There is no direct evidence to support such a submission. At best, an inference is open that complying with parole conditions may be more difficult for the applicant because of her commitments to the care of SJ. Further, as already explained, a prisoner on parole is managed by the exercise of discretionary powers vested in the Chief Executive. There is no reason to believe that those powers would be exercised in an oppressive way or exercised without reference to the applicant's personal circumstances, including her need to care for SJ.

[55] Counsel for the applicant submitted that the applicant's history, personal circumstances and commitment to the care of SJ are all matters made relevant by s 9 of the *Penalties and Sentences Act*. That is undoubtedly correct. However, those factors do not necessarily suggest that the appropriate order is the suspension of the sentence. Further, rehabilitation is a consideration.

[56] The applicant has had a difficult life. She continues to face challenges. One of her children needs a good deal of her care; another of her sons is the subject of a domestic violence order. There is evidence of yet another of her sons being involved in the commission of offences. She is described by the psychologist as someone who is "vulnerable to the influence of others". Through that vulnerability, the applicant was led into the commission of the offence the subject of this application.

[57] It is desirable that the applicant is subject to some supervision. On the evidence presently before the Court, release on supervision is likely to increase her chances of success in not reoffending. The extent and nature of the supervision is a matter for the Chief Executive. I would grant leave to appeal the sentence, but I would impose the same sentence and make the same orders as were imposed and made by the learned sentencing judge.

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26 Pursuant to *Criminal Code* (Qld) s 355.

27 See *Criminal Code* (Qld) s 7; *R v Beck* [1990] 1 Qd R 30.

[58] I would order:

1. The application to adduce further evidence be allowed and the Court receive into evidence on the application for leave to appeal against sentence the report of psychologist, Sara Jones.

2. Leave to appeal against sentence is granted.

3. The appeal against sentence is dismissed.