SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fifita* [2004] QCA 201
PARTIES:	**R** **v** **FIFITA, Siaosi** (applicant/appellant)
FILE NO/S:	CA No 22 of 2004 DC No 2883 of 2001 DC No 2809 of 2003 DC No 9 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 June 2004
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2004
JUDGES:	McMurdo P, Jerrard JA and Mullins J Joint reasons for judgment of McMurdo P and Mullins J; separate reasons of Jerrard JA, dissenting
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Allow appeal against sentence to the limited extent of removing the recommendation for post-prison community based release after serving two years and two months**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – NON-PAROLE PERIOD OR MINIMUM TERM – QUEENSLAND – where appellant already serving term of imprisonment for which no recommendation for post-prison community based release had been made – whether sentencing judge when imposing another term of imprisonment on the appellant was required pursuant to s 157(3) *Penalties and Sentences Act* 1992 (Qld) to make a recommendation for post-prison community based release *Corrective Services Act* 2000 (Qld) s 135(2)(e) *Penalties and Sentences Act* 1992 (Qld) s 147, s 157, s 161 *Burton v R* [1995] QCA 445; (1995) 83 ACrimR 453, considered

R v C [2003] QCA 441; CA No 70 of 2003, 17 October 2003, considered
R v Doyle [1996] 1 Qd R 407, considered
R v Waters [1998] 2 Qd R 442, considered
R v Ziegerink [2002] QCA 499; CA No 280 of 2002, 15 November 2002, questioned

COUNSEL: The applicant/appellant appeared on his own behalf
M J Copley for the respondent

SOLICITORS: The applicant/appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P and MULLINS J:** The relevant facts, issues and statutory provisions are set out in Jerrard JA's reasons which we have had the benefit of reading. We will repeat only those necessary to explain our reasons for reaching a slightly different conclusion.

[2] The learned primary judge only made the recommendation for post-prison community based release (PPCBR) after two years and two months, a point after which the applicant would otherwise be eligible to apply for PPCBR under s 135(2)(e) *Corrective Services Act* 2000 (Qld) ("the amending Act"), because the prosecutor said that he was required to do so under s 157(3) *Penalties and Sentences Act* 1992 (Qld) ("the Act"). It is plain from the transcript that otherwise his Honour would not have made any recommendation as to parole.

[3] The applicant is unrepresented. Mr M J Copley for the respondent, with his customary helpfulness and fairness, contended that his Honour was not required to make a recommendation for eligibility for parole under s 157(3) because there was no recommendation for parole in respect of the first term of imprisonment. The original term of imprisonment was initially suspended but, after a breach, was then ordered to be wholly served under s 147 of the Act.[1] Mr Copley referred to *R v Doyle*[2] and *Burton v R*[3] to support his contention. In those cases, this Court held that a court was only obliged to make a parole recommendation under s 157(3) as then enacted if a recommendation for parole had been made in the previously imposed sentence of imprisonment. That has been followed by sentencing judges since: see, for example, *R v McCormick; ex parte Attorney-General of Qld*.[4] Section 157(3) was extensively amended[5] by the amending Act, operational since 1 July 2001.

[4] The alternative construction of the amended s 157(3) is that it requires the sentencing judge to make a PPCBR recommendation under s 157(3) whether or not a PPCBR recommendation was made in respect of the earlier term of imprisonment. Jerrard JA in obiter remarks in *R v C*[6] and Robertson and Mackenzie in their

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1 There can be no recommendation for parole on a suspended sentence ordered to be served after breach: *R v Waters* [1998] 2 Qd R 442.
2 [1996] 1 Qd R 407.
3 (1995) 83 ACrimR 453.
4 [1999] QCA 354; CA No 205 of 1999, 27 August 1999.
5 The amending Act, No 63 of 2000, s 276 and Sch 2, operational 1 July 2001.
6 [2003] QCA 441; CA No 70 of 2003, 17 October 2003, [26].

Queensland Sentencing Manual[7] have formed this preliminary view. It was also the view of this Court in the ex tempore decision of *R v Ziegerink*[8] but the court there gave no consideration to *Doyle* or *Burton* and the argument now raised by the respondent. For that reason, *Ziegerink* is of limited assistance and should not bind this Court on the issue if it forms a considered contrary view.

[5] Does s 157 as amended still only require a judge to make a PPCBR recommendation when sentencing an offender to an overall period of imprisonment of more than two years when the earlier sentence contained a recommendation for PPCBR, or does it require the making of the recommendation whether or not a recommendation for PPCBR was made as part of the earlier sentence?

[6] In determining this issue, it is helpful to set out and compare the sections before and after the amendments with the changes emphasised.

Before amendment	***Current***
Eligibility for parole	**157** ***Eligibility for post-prison community based release***
157.(1) In this section -	**(1)** In this section—
"*non-parole period*" means the part of a *term of imprisonment* or period of imprisonment that an offender must serve before the offender is eligible to apply for *parole*.	**"*non-release period*"** means the part of a period of imprisonment that an offender must serve before the offender is eligible to apply for *a post-prison community based release order under the Corrective Services Act 2000.*
(2) If a court imposes a term of imprisonment on an offender, it may recommend that the offender be eligible for *release on parole after having served such part of the term of imprisonment as the court specifies in the recommendation*.	**(2)** If a court imposes a term of imprisonment *of more than 2 years* on an offender, it may recommend that the offender be eligible for post-prison community based release only after serving a specified part of the term.
(3) If a court imposes another term of imprisonment on an offender who is already serving imprisonment for an offence, the court must -	**3)** If a court imposes another term of imprisonment on an offender who is already serving imprisonment for an offence, *and the offender's period of imprisonment is more than 2 years*, the court must—
(a) if it is a court of like jurisdiction or higher jurisdiction to the court that last sentenced the offender to a term of imprisonment - make a *fresh* recommendation for *parole* relating to the period of imprisonment that the offender must serve; or	(a) if it is a court of like jurisdiction or higher jurisdiction to the court that last sentenced the offender to a term of imprisonment—make a recommendation for *post-prison community based release* relating to the period of imprisonment that the offender must serve; or
(b) if it is a court of lesser jurisdiction to the court that last sentenced the offender to a term of imprisonment, recommend a *non-parole* period in relation to the fresh term of imprisonment imposed by the court.	(b) if it is a court of lesser jurisdiction to the court that last sentenced the offender to a term of imprisonment, recommend a *non-release* period in relation to the fresh term of imprisonment imposed by the court.
(4) In making a *new* recommendation under subsection (3)(a), the court -	**(4)** In making a recommendation under subsection (3)(a), the court—
(a) must have regard to all the facts known to	(a) must have regard to all the facts known to

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7 At 15.320.

8 [2002] QCA 499; CA No 280 of 2002, 15 November 2002.

9 Subsection (7) of s 157 was introduced by the *Penalties and Sentences (Serious Violent Offences) Amendment Act*, No 4 of 1997, s 4.

the court; and (b) must ensure that the *non-parole* period is not less than that mentioned in subsection (2). **(5)** A *new* recommendation made under subsection (3)(a) - (a) revokes previous recommendations made by courts in relation to a *non-parole* period for an offender; and (b) starts on the day it is made. **(6)** If a recommendation is made under subsection (3)(b) and the existing *non-parole* period - (a) has not ended - the *non-parole period* in relation to the total period of imprisonment is the total of all *non-parole* periods that are in force; or (b) has ended - the *non-parole* period in relation to the fresh term of imprisonment - (i) starts on the day the recommendation is made; and (ii) must not be longer than the fresh term of imprisonment imposed on the offender. **(7)**[9] If an offender is convicted of a serious violent offence— (a) the court that sentences the offender for the serious violent offence can not make a recommendation under this section that reduces the period of imprisonment the offender must serve before being eligible for *release on parole* under the *Corrective Services Act 1988, section 166(1)(c)*; and (b) no recommendation made under this section by any court can reduce the period of imprisonment that the offender must serve before being eligible for *release on parole* under the *Corrective Services Act 1988, section 166(1)(c).*	the court; and (b) must ensure that the *non-release* period is not less than that mentioned in subsection (2). **(5)** A recommendation made under subsection (3)(a)— (a) revokes previous recommendations made by courts in relation to a *non-release* period for an offender; and (b) starts on the day it is made. **(6)** If a recommendation is made under subsection (3)(b) and the existing *non-release* period— (a) has not ended—the *non-release period* in relation to the total period of imprisonment is the total of all *non-release* periods that are in force; or (b) has ended—the *non-release* period in relation to the fresh term of imprisonment— (i) starts on the day the recommendation is made; and (ii) must not be longer than the fresh term of imprisonment imposed on the offender. **(7)** If an offender is convicted of a serious violent offence— (a) the court that sentences the offender for the serious violent offence can not make a recommendation under this section that reduces the period of imprisonment the offender must serve before being eligible for *post-prison community based release* under the *Corrective Services Act 2000*; and (b) no recommendation made under this section by any court can reduce the period of imprisonment that the offender must serve before being eligible for *post-prison community based release* under the *Corrective Services Act 2000.*

[7] We are not persuaded that s 157 now requires a judge to make a parole recommendation when imposing another term of imprisonment on an offender who is already serving imprisonment of more than two years if no recommendation for PPCBR was made on the earlier term of imprisonment.

[8] A central concern in construing the amended s 157(3) is the legislative intent in making the amendments. If only the observations made in the Explanatory Notes to the amending Act when a Bill, that it had been "written in plain English[,] [c]onsequently, particular clauses and sub-clauses require little or no specific explanation", applied to the amendments to s 157. According to those Explanatory Notes, the Bill was to:

> "… provide for the safe and humane containment, supervision and rehabilitation of sentenced offenders and persons detained in custody

> on remand.[10] A major priority of the Bill is the safety of the community, the safety of staff and visitors and the safety of offenders. The proposed Bill will provide for the management of offenders within a safe environment and according to their risks and needs so as to address and provide for their rehabilitation requirements."

[9] We have found nothing in the lengthy General Outline or elsewhere in those Explanatory Notes or in the Second Reading Speech to give any clue as to the legislative intention as to the amendments to s 157. There is certainly no indication that those amendments were intended to alter the position since *Doyle*, decided in April 1994, over six years earlier, that a court was only required to make a recommendation for PPCBR under s 157(3) if a PPCBR recommendation was made in respect of the first term of imprisonment.

[10] The amendments to s 157 were but consequential amendments flowing from the major changes to the previous parole system brought in by the amending Act. Parole has been incorporated in the phrase PPCBR, a term now also encompassing release to work orders and home detention.[11] A judge can only recommend PPCBR if the sentence is for a term of imprisonment of more than two years.

[11] In *Doyle* this Court in interpreting s 157(3) referred to the use of the phrase "fresh recommendation for parole" in s 157(3)(a); that s 157(4) and 157(5) speak of a "new recommendation made under sub-section (3)(a)"; and that the phrase "the existing non-parole period" in s 157(6) assumes that such a period will exist or have existed.[12] Of those considerations, only the last remains in the amended s 157. If the legislature intended in omitting the word "fresh" in s 157(3)(a) and the word "new" in s 157(4) and (5), to legislatively overturn *Doyle*, why did it not also amend s 157(6)? Why did it not state that was its intention in the lengthy Explanatory Notes or in the Second Reading Speech? The most likely answer is that the omission of "fresh" and "new" was not intended to have that consequence.

[12] We can see no reason why the legislature would require a judge to make a recommendation for parole when imposing a subsequent term of imprisonment for an offence unless it was in circumstances where there had already been a recommendation for eligibility for parole as to an earlier term of imprisonment still to be served, requiring the judge to review, with the knowledge of the prisoner's subsequent offending, his appropriate release date: see McPherson JA's observations in *Burton*.[13]

[13] In *Doyle*, the court observed that its construction of s 157(3) would not bring about any unjust result because a prisoner would become eligible for parole after he had served half the period of imprisonment, (the combination of the terms of imprisonment), to which the prisoner was sentenced. That remains the position under the amended s 157(3): see s 135(2)(e) of the amending Act.

[14] The alternative interpretation could unduly fetter the sentencing court's discretion. For example a court may have earlier imposed a term of imprisonment of more than

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10 See also the amending Act, s 3.
11 See the amending Act, s 141.
12 Above, at 410.
13 McPherson JA, at 455.

two years for a series of offences and suspended it forthwith. The offender may later be sentenced for further relatively minor offences forming part of the original series of offending. A further suspended sentence may be an appropriate penalty. The judge would, under s 157(3), be required to make a PPCBR recommendation and parole recommendations cannot be made in respect of suspended sentences.[14] This would preclude the imposition of a suspended sentence. Similarly, an offender sentenced to a two and a half year term of imprisonment released on PPCBR but still serving that term of imprisonment could arguably not be sentenced to serve a further term of imprisonment by way of an Intensive Correction Order, even where this was the most appropriate sentence for, say, minor offences which predated the offending the subject of the earlier sentence.

[15] Sub-section 157(3) in its present form should not be read in isolation but in the context of the whole section. The immediately preceding s 157(2) gives a court imposing a term of imprisonment of more than two years on an offender the power to recommend that the offender be eligible for parole after serving a part of the term. This sets the context for s 157(3) which refers to the court imposing *another* term of imprisonment on the offender. The proximity of these words to s 157(2) suggests that s 157(3) applies only where a PPCBR recommendation has first been given under s 157(2). Sub-section 157(4)(b) obliges the court to ensure that the recommendation it must make under s 157(3) is "not less than that mentioned in sub-section (2)". This also implies that before being required to make the recommendation for PPCBR under s 157(3) there must be an existing recommendation made in respect of the first term of imprisonment under s 157(2). That view is also supported by the words of s 157(5)(a) "previous recommendations" and arguably by the words in s 157(6) "existing non-release period" which appear to assume a recommendation for parole has been made in respect of the first term of imprisonment.[15]

[16] In our view, s 157(3) as amended does not apply unless there has been a recommendation for PPCBR attached to the earlier term of imprisonment under s 157(2).

[17] The applicant spent a period of time in pre-sentence custody. For some of that period, he was serving a portion of the activated suspended sentence. It is unclear from the transcript whether for the remaining 49 days he was in custody solely because of his more recent offending or also for his breach of suspended sentence. The prosecutor at sentence contended that the applicant was not in custody solely for the subsequent offences during any of that period and that "it's probably the case" that no declaration could be made under s 161 of the Act, although the judge was "perhaps" entitled to take it into account. The applicant's counsel at sentence did not submit that a declaration could or should be made. The modest concurrent sentence imposed by the learned primary judge and the discussion between the judge and counsel immediately before passing sentence make it plain that his Honour did take into account the period spent in pre-sentence custody in moderating the penalty. The applicant has not established any error under s 161 of the Act.

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14 See fn 1.

15 It is not clear whether "non-release period" here refers to a non-release period arising from s 157(2) of the Act or to a non-release period under s 135 of the amending Act. It is not necessary to decide that issue for the purposes of this case.

[18] We agree with Jerrard JA that the sentence imposed is not manifestly excessive. As we have observed earlier, the learned sentencing judge only made the recommendation for PPCBR after persuasion by the prosecutor that he was obliged to do so under s 157(3) of the Act. This has the effect that the applicant has to spend longer in custody than his Honour otherwise intended. For that reason, we would grant the application for leave to appeal against sentence and allow the appeal to the limited extent of removing the recommendation for post-prison community based release after serving two years and two months.

[19] **JERRARD JA:** On 6 January 2004 Mr Fifita pleaded guilty in the District Court in Brisbane to three offences of burglary and stealing. He also pleaded guilty to summary offences, being two offences of possession of tainted property, described in the record as one of failing to take reasonable precautions, one of possession of a utensil, one of having a blood alcohol content in excess of the permitted limit while driving, one of unlicensed driving and one of contravening a direction. For the offences of burglary and stealing he was sentenced to three and a half years imprisonment, and on the summary offences the learned judge simply imposed convictions. The judge also ordered that Mr Fifita serve the remaining two years and two months of a previously (partly) suspended four year sentence imposed on Mr Fifita on 2 November 2001, and ordered that that be served concurrently with the three and a half years. The learned judge recommended that Mr Fifita be considered for community based release after he had served that two years and two months imposed with respect to the suspended sentence. Mr Fifita has applied for leave to appeal against those orders, arguing that they result in a sentence which is manifestly excessive.

[20] The first of those offences of burglary was committed on 19 March 2003, when Mr Fifita's female companion approached the 80 year old complainant at her home, and had a short conversation about buying some birds from that woman. Some 20 minutes later neighbours of that victim saw Mr Fifita in the complainant's house, and then crouching inside her fence. The female companion was in a car outside. Mr Fifita was confronted by one neighbour and he ran down the street carrying a bin. The complainant later discovered that two handbags and about $500.00 in money had been stolen from her.

[21] The registration of the vehicle was traced and two days later Mr Fifita was arrested and charged. He was released on bail and on 10 June 2003 committed the second offence of burglary, when he entered another person's home and stole a lap top computer worth about $4,000.00. It was not recovered. Next day, 11 June 2003, he committed the third offence of burglary and stealing, when he entered a third person's home and stole a small amount of money.

Mr Fifita's prior convictions

[22] As well as his being on bail when the last two offences were committed, Mr Fifita had the suspended sentence then imposed on him. His record of criminal conviction begins on 3 March 1995, when he was convicted of offences of dangerous driving, stealing, unlawfully using motor vehicles, and breaking and entering a dwelling house. He was then sentenced under the *Juvenile Justice Act* 1992 to eight months detention. On 25 March 1996 he was convicted in the Inala Magistrates Court of the offence of stealing, committed on 3 March 1996. He next appeared in the Brisbane Magistrates Court on 1 November 1996, when he was convicted of having

unlawfully used a motor vehicle on 23 October 1996, of possession of a dangerous drug on 22 April 1996, and of breaching a bail undertaking on 30 July 1996. He was sentenced to three months imprisonment.

[23] He then appeared in the Brisbane District Court on 5 September 1997, when he was dealt with for unlawfully using a motor vehicle on 25 May 1997, and for an offence of stealing committed in April 1996. He was sentenced to four months imprisonment, and it was ordered that on release from custody he be on probation for two years.

[24] He appeared again in the Brisbane District Court on 19 June 1998 when he was dealt with for breaching that probation order imposed on 5 September 1997 and sentenced to imprisonment for 12 months, with a recommendation that he be considered eligible for release on parole on 9 November 1998. He appeared in the District Court again on 20 January 1999, when he received a wholly suspended sentence of six months imprisonment for offences of assault occasioning bodily harm with a circumstance of aggravation, committed on 12 June 1998, and thus six days before his immediately prior appearance in the District Court.

[25] He was then dealt with in the Beenleigh District Court on 15 August 2000, for an offence of entering premises and committing an indictable offence therein committed on 10 November 1999. Mr Fifita was also dealt with that day for breaching the suspended sentence imposed on 20 January 1999; it was ordered that he serve 12 months imprisonment by way of an intensive correctional order.

[26] He then appeared in the Brisbane District Court on 2 November 2001, and was sentenced in respect of 12 charges of entering premises and committing indictable offences, committed between 17 November 1999 and 25 March 2001; two charges of assault occasioning bodily harm, committed on 1 May 2000 and 25 March 2001; an offence of attempting to enter a dwelling house with intent, committed on 8 January 2001; and five other charges of entering premises with intent to commit an indictable offence, committed between December 1999 and August 2000. For all those offences he was sentenced to four years imprisonment, that sentence to be suspended after he had served 16 months, with an operational period of five years.

Partial activation of the suspended sentence in October 2003

[27] Mr Fifita then appeared in the Inala Magistrates Court on 4 July 2003, when he was dealt with for two offences of breaching bail undertakings he had given. He was sentenced to two weeks imprisonment. Those convictions and sentences resulted in his appearing in the Brisbane District Court on 3 October 2003, apparently by arrangement, where he was dealt with under s 147(1) of the *Penalties and Sentences Act* 1992 for having breached the suspended sentence imposed on 2 November 2001. There is no evidence in the appeal record that he spent any time in custody on remand waiting to be dealt with under s 147. The learned judge then sentencing him ordered that the suspended sentence be partially activated on all charges and that Mr Fifita be sentenced to six months imprisonment. The same judge also sentenced Mr Fifita on 6 January 2004. The appeal record from the January 2004 proceedings records (at AR 5) that in October 2003 the learned judge had been minded to sentence Mr Fifita simply to the rising of court, but Mr Fifita's counsel invited the learned judge to impose that six months sentence of imprisonment.

[28] That invitation, acted on by the judge, was extended because counsel considered that if Mr Fifita remained in custody and awaiting sentence after 3 October 2003, then when he finally came to be sentenced that time spent in custody could not count as time already served under the suspended sentence because of s 161(2)(c) and (d) of the Act. The appeal record in this matter records that Mr Fifita's counsel (it was the same counsel) frankly submitted on 6 January 2004 that counsel's judgment made in October 2003 was that counsel would be unable to persuade the learned judge pursuant to s 147 of the *Penalties and Sentences Act*, when Mr Fifita was sentenced for the burglaries, that it was unjust to order that Mr Fifita serve the whole of the remaining 26 months of the suspended sentence. The appeal record does not show any reason for doubting counsel's opinions.

[29] The appeal record records that Mr Fifita had already been in custody from 15 August 2003 until 2 October 2003, for a period of 49 days, in respect of the counts of burglary and stealing (and summary matters), on which he had pleaded guilty. A result of the six months activation of the partly suspended sentence meant that there was still a period of two years and two months remaining suspended, under an operational period that would not expire until 2 November 2006.

The appropriate head sentence

[30] The Crown Prosecutor submitted to the learned sentencing judge that a head sentence of four and a half years to five years would be the appropriate range. The learned judge told Mr Fifita's counsel that the judge considered Mr Fifita had been a persistent offender who had committed a lot of burglaries and who continued to commit them, that the real issue was what the head sentence should be, and that the learned judge considered he should mitigate the head sentence the Crown had suggested, because the judge considered it was unlikely that Mr Fifita would succeed in getting any early release on parole. The judge suggested that either a three and a half or four year sentence of imprisonment would be appropriate as a head sentence, and Mr Fifita's counsel agreed with the learned judge that counsel could not argue against that.

[31] The judge repeated in other exchanges with Mr Fifita's counsel that the reality was that Mr Fifita would not be considered for parole, and settled upon a three and a half year sentence of imprisonment as the appropriate one. When sentencing Mr Fifita, the learned judge explained that that head sentence was designed to reflect the plea of guilty and Mr Fifita's apparent remorse, and that it took into account the judge's assessment of the unlikelihood of Mr Fifita's obtaining parole at any early stage. The learned judge then enlivened the remainder of the suspended sentence, ordering that it be concurrent.

Relevant legislation

[32] There then occurred the matter that seems to have produced this application, and which highlights some of the complexities in deciding an appropriate sentence, caused by the provisions of the *Penalties and Sentences Act* 1992 and the *Corrective Services Act* 2000. What occurred was that the prosecutor reminded the learned judge that since Mr Fifita was currently serving a term of imprisonment (the six months imposed on 3 October 2003) the provisions of s 157(3) of the *Penalties and Sentences Act* appeared to require that the judge make a recommendation for "post prison community based release" (parole), relating to "the period of

imprisonment that the offender must serve." The prosecutor suggested that the judge make that recommendation after Mr Fifita had completed the activated suspended sentence, and the judge followed the suggestion, recommending that Mr Fifita be considered for community based release after he has served the two years and two months imposed with respect to the suspended sentence. It is evident from the appeal record that that last recommendation was made only because of the matter the prosecutor raised, and that the learned judge was otherwise not going to make any recommendation. The suggestion that the judge's recommendation be for eligibility after Mr Fifita completed his 26 month activated suspended sentence accords with the decision of this court in *R v Waters* [1998] 2 Qd R 442, where it was held that a sentencing court which ordered under s 147(1)(b) of the *Penalties and Sentences Act* that an offender serve the remainder of a term of imprisonment previously suspended did not thereby impose a term of imprisonment within the meaning of s 157(2) of that Act, and accordingly had no power to make a parole recommendation in respect of that activated suspended sentence.

[33] Section 157 provides as follows:

> **(1)** In this section-
>
> "**non-release period**" means the part of a period of imprisonment that an offender must serve before the offender is eligible to apply for a post-prison community based release order under the *Corrective Services Act 2000*.
>
> **(2)** If a court imposes a term of imprisonment of more than 2 years on an offender, it may recommend that the offender be eligible for post-prison community based release only after serving a specified part of the term.
>
> **(3)** If a court imposes another term of imprisonment on an offender who is already serving imprisonment for an offence, and the offender's period of imprisonment is more than 2 years, the court must –
>
> (a) if it is a court of like jurisdiction or higher jurisdiction to the court that last sentenced the offender to a term of imprisonment – make a recommendation for post-prison community based release relating to the period of imprisonment that the offender must serve; or
>
> (b) if it is a court of lesser jurisdiction to the court that last sentenced the offender to a term of imprisonment, recommend a non-release period in relation to the fresh term of imprisonment imposed by the court.
>
> **(4)** In making a recommendation under subsection (3)(a), the court –
>
> (a) must have regard to all the facts known to the court; and
>
> (b) must ensure that the non-release period is not less than that mentioned in subsection (2).
>
> **(5)** A recommendation made under subsection (3)(a) –
>
> (a) revokes previous recommendations made by courts in relation to a non-release period for an offender; and
>
> (b) starts on the day it is made.
>
> **(6)** If a recommendation is made under subsection (3)(b) and the existing non-release period –

(a) has not ended – the non-release period in relation to the total period of imprisonment is the total of all non-release periods that are in force; or

(b) has ended – the non-release period in relation to the fresh term of imprisonment –

(i) starts on the day the recommendation is made; and

(ii) must not be longer than the fresh term of imprisonment imposed on the offender.

(7) If an offender is convicted of a serious violent offence –

(a) the court that sentences the offender for the serious violent offence can not make a recommendation under this section that reduces the period of imprisonment the offender must serve before being eligible for post-prison community based release under the *Corrective Services Act 2000*; and

(b) no recommendation made under this section by any court can reduce the period of imprisonment that the offender must serve before being eligible for post-prison community based release under the *Corrective Services Act 2000*.

[34] The section as it was when *R v Waters* was determined is set out in the reasons for judgment in *R v Doyle* [1996] 1 Qd R 407 at 409. Section 157(2) and the introductory four lines of s 157(3) are relevantly the same now as then, with the difference now being the addition of the words "of more than 2 years" in s 157(2), and the words "and the offender's period of imprisonment is more than 2 years" in s 157(3). In *R v Waters*, Pincus JA thought that s 157(2) seemed more naturally to refer to the original imposition of the term of (suspended) imprisonment under s 144 rather than an order under s 147 that the offender serve the whole or part of the term initially so ordered. He remarked upon the introductory words in s 10(1) (relevantly unamended now) which read "If a court imposes a sentence of imprisonment, including a suspended sentence of imprisonment." McPherson JA agreed in *R v Waters* that in acting under s 147(1)(b) a judge was not imposing a term of imprisonment or another term of imprisonment within the meaning of s 157(2) or s 157(3), but was ordering a term of imprisonment already imposed but suspended to be served. Pincus JA had also observed that the formal order made under s 147(1)(b) or (c) would be that (the offender) serve the whole (or part) of the suspended term. I agree that it would not be simply an order of a sentence of imprisonment.

[35] Had the learned judge not made any recommendation as to eligibility for parole then Mr Fifita's position would have been governed by ss 134 and 135 of the *Corrective Services Act* 2000, which relevantly provide that a prisoner in Mr Fifita's position may apply for a parole order which may start once that prisoner has (s 135(2)(e)) "served half of the period of imprisonment to which the prisoner was sentenced". Schedule 3 of that Act refers for the definition of "period of imprisonment" to s 4 of the *Penalties and Sentences Act*, wherein that term is defined to mean the unbroken duration of imprisonment that an offender is to serve for two or more terms of imprisonment, whether ordered to be served concurrently or cumulatively or imposed at the same or different times. Since Mr Fifita was sentenced on 3 October 2003 to six months imprisonment of which three months and three days had been served when he was sentenced to three and a half years further imprisonment on 6 January 2004, the period of imprisonment to which he was sentenced was a period

totalling three years nine months and three days, commenced on 3 October 2003. Accordingly, the parole eligibility date applicable to him in the absence of any other order would have been a date 22.5 months (plus 1.5 days) after 3 October 2003, or on or about 18 August 2005.

[36] The effect of the recommendation made by the learned judge was that Mr Fifita's eligible date for parole consideration became on two years and two months from 6 January 2004, namely 6 March 2006, thus putting the eligibility date back nearly seven months. Mr Fifita clearly regards that as significant, although the very experienced sentencing judge had determined upon the head sentence imposed in the expectation that Mr Fifita would not get parole. Accepting that Mr Fifita has already benefited from that assumption, the position remains that whether Mr Fifita is released on parole will be solely the discretionary decision of a Regional Community Corrections Board established under the *Corrective Services Act* 2000. The difference in eligible dates for parole consideration makes it necessary to determine if the learned judge was obliged to make a parole recommendation. I understand Mr Fifita, who represented himself, also complains that the 49 days pre-sentence detention was not sufficiently taken into consideration.

[37] I am satisfied that s 157(3) did oblige the judge to make a parole recommendation. In *R v Doyle* this court held that s 157(3) only so required where there had been a recommendation for parole attached to the earlier term of imprisonment which the offender was still serving when another term of imprisonment was imposed by another sentencing court. In *Doyle* the court so construed s 157(3) because of the phrases "fresh recommendation for parole" in s 157(3)(a) and "new recommendation made under subsection (3)(a)" both in s 157(4) and (5), and the phrase "the existing non-parole period" in s 157(6). Only that last phrase was retained in s 157 when its provisions were amended by s 13 of schedule 2 of the *Corrective Services Act* 2000, in July 2001. Amendments then made omitted "fresh" from s 157(3)(a) and "new" from the introductory phrases in s 157(4) and (5). The explanatory notes to the *Corrective Services Act* 2000, do not refer to the amendments to those sections of the *Penalties and Sentences Act*. I consider the effect of those amendments is to remove the principal matters on which the reasoning of the court depended in *R v Doyle*.

[38] The decision in *Doyle* was taken further in *Burton* in which this court held that a parole order cannot be made in respect of the aggregate or total period of imprisonment resulting from orders made at different times where the first sentence imposed did not contain a recommendation for parole. The consequence of those rulings was that in such common enough situations, only the parole eligibility provisions automatically applying (at that time by virtue of s 166(1) of the *Corrective Services Act* 1988) were relevant. Those rendered a prisoner eligible for release on parole after serving half of the term of imprisonment to which the prisoner was sentenced. Section 10 of the *Corrective Services Act* 1988 then defined "term of imprisonment" in the same manner as s 4 of the *Penalties and Sentences Act* now defines "period of imprisonment."

[39] The respondent submitted that the learned judge was not obligated by s 157(3) to make a recommendation for parole, relying upon the reference in s 157(4)(b) to a non-release period "not less than that mentioned in subsection (2)", on the reference in s 157(5)(a) to "previous recommendations made by courts in relation to a non-release period", and the reference in s 157(6) to "the existing non-release period".

The respondent thus argued the position declared in *Burton* still applied. I respectfully consider that those parts of s 157 on which the respondent now relies do not diminish the obligation s 157(3) imposes in unambiguous terms in cases such as this one. Counsel for the respondent agreed that Mr Fifita was already serving imprisonment for an offence (six months) on 6 January 2004 when the District Court imposed another term of imprisonment on him. The effect of s 157(4)(b) is to ensure that where there was an earlier recommendation made for parole the new recommendation made under s 157(3)(a) is not less than the originally recommended non-parole period. That is, I consider the amendments to s 157 made by the *Corrective Services Act* 2000 have reversed the application of the section as it stood when *R v Doyle* and *Burton* were decided.

[40] I consider that the reference in s 157(5)(a) to "previous recommendations" should be understood as meaning "(any) previous recommendations (if made)". The reference in s 157(6) to the existing non-parole period should be understood as including each of a non-parole period resulting from a recommendation by a court and a non-parole period otherwise automatically applying. I conclude that the learned judge was obliged to do as he did, both in having to make a recommendation for parole eligibility and to ensure that it did not apply to the activated suspended sentence. The parole eligibility date thus ordered must stand on this appeal, and I consider that the head sentence imposed was certainly not a manifestly excessive one. That leaves only the question of the 49 days already served, which the learned judge did not declare to be imprisonment already served when imposing the sentence of three and a half years.

Section 161

[41] Counsel for the respondent submitted that Mr Fifita received the benefit of almost three months not served of the six months imposed on 3 October 2003, that unserved period being effectively made concurrent with the three and a half years sentence imposed on 6 January 2004. That submission has force, and the learned judge accepted the submission of the Crown Prosecutor that while the judge was unable to declare those 49 days against the activated suspended sentence, they could be taken into account in an overall way. The judge explained that was being done when settling on the head sentence of three and a half years. That was a shorter term than his previous sentence. I add that I consider that had the judge not taken them into account in that manner, then the judge would have been entitled to make a declaration under s 161 regarding those 49 days, but only in respect of the sentence for three and a half years, and not in respect of the activated suspended sentence.

[42] This is because s 161(1) commences with the words "If an offender is sentenced to a term of imprisonment for an offence." I consider it appropriate to apply to the expression "sentenced to a term of imprisonment" the like construction as that applied in *R v Waters* to "imposes a term of imprisonment". If follows that even without s 161(2)(c) or (d), s 161(1) would not apply where a court was ordering that all or part of a sentence of imprisonment already imposed, but previously suspended, be served. On 6 January 2004 the only term of imprisonment to which Mr Fifita was sentenced (and the only term of imprisonment imposed on him that day, applying the *R v Waters* construction) was the term of three and a half years. It was agreed that he had spent 49 days in custody in relation to proceedings for the offences resulting in that term of imprisonment, and for no other reason; but since the court explained that the 49 days so spent were part of the reason the head

sentence imposed was fixed at three and a half years, I consider it appropriate to regard the learned sentencing judge as having otherwise ordered within the meaning of s 161(1). It follows that the application for leave to appeal should be dismissed.

[43] I would dismiss the application.