

SUPREME COURT OF QUEENSLAND

CITATION: *Psaila v Department of Corrective Services* [2004] QSC 448

PARTIES: **PAUL ANTHONY PSAILA**
(applicant)

v

**THE CHIEF EXECUTIVE, DEPARTMENT OF
CORRECTIVE SERVICES**
(respondent)

FILE NO/S: BS 8255/04

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court
Brisbane

DELIVERED ON: 15 December 2004

DELIVERED AT: Brisbane

HEARING DATE: 7 December 2004

JUDGE: McMurdo J

ORDER: **I declare that the period from 23 November 1998 until 16 May 2000 counts as time served for the applicant's period of imprisonment under the orders of the District Court made on 8 May 1997**

CATCHWORDS: CRIMINAL LAW – PROBATION, PAROLE, RELEASE ON LICENCE AND REMISSIONS – QUEENSLAND – where applicant's parole was cancelled under s 185 of *Corrective Services Act* 1988 – where that Act provided that no time of prisoner's release on parole is regarded as time served in respect of that term – whether s 152 *Corrective Services Act* 2000 so that time between applicant's release on parole and his breach of parole condition counts as time served

Corrective Services Act 1988 (Qld), s 165, s 185, s 188, s 189, s 190

Corrective Services Act 2000 (Qld), s 150, s 152, s 268A, s 268

Judicial Review Act 1991 (Qld)

Service and Execution of Process Act 1992 (Cth)

COUNSEL: Applicant appeared on his own behalf
M Plunkett for the respondent

SOLICITORS: Applicant appeared on his own behalf
Crown Solicitor for the respondent

- [1] **McMURDO J:** The applicant is a prisoner at the Borallan Correctional Centre. On 8 May 1997, he was convicted of offences for which he was then sentenced to concurrent terms of imprisonment of four years, with a recommendation that he be considered for parole after serving 12 months.
- [2] On 23 November 1998 he was released on parole, pursuant to s 165 of the *Corrective Services Act* 1988 (Qld). On 16 May 2000, he breached a condition of his parole order by failing to report as directed. In consequence of that breach, his parole was cancelled under s 185 of that Act on 31 August 2000. It was cancelled by the West Moreton Regional Community Corrections Board which at the same time issued a warrant for his apprehension, pursuant to s 188. On 6 May 2003, he was arrested in Victoria and was returned to the custody of the respondent on 9 May 2003.
- [3] The Department calculates that his four year term will expire on 28 November 2005, on the basis that none of the period between his release on parole and his return to prison should be treated as time served. The applicant contends that he is entitled to be credited for the period during which his parole order was in force. By this amended application under the *Judicial Review Act* 1991 (Qld) he seeks a declaration to that effect. But if his argument is accepted, he would be entitled to be credited not for the whole of that period, but for the time for which he was on parole until the breach of his parole condition. He would thereby be credited with the period from 23 November 1998 to 16 May 2000 as time served under his sentence with the consequence that he has already reached his full time release date.
- [4] The dispute arises because the effect of a cancellation of parole upon a sentence is different according to the (current) *Corrective Services Act* 2000 (Qld) from the effect which had been prescribed by the now repealed 1988 Act. According to the current Act, a prisoner is credited with the period of his parole up to the date of the event by which it was cancelled. Under the previous Act, it was expressly provided that none of the period for which the prisoner was on parole was to be treated as time served. Although the applicant's parole was cancelled under the previous Act, he says that the effect of that cancellation upon his sentence is according to the current Act. Ultimately, the issue is one of the proper interpretation of a transitional provision of the current Act.

Parole cancellation under the repealed Act

- [5] Section 165 of the repealed Act empowered the Queensland Community Corrections Board or (as in this case) a regional community corrections board to release a prisoner on parole. Section 183 provided that upon the expiry of the prisoner's parole period, absent an order for cancellation of the parole or the commission of a further offence for which the prisoner was sentenced to a term of imprisonment, the prisoner should be deemed to have served his term of imprisonment and he was entitled to be wholly discharged. Section 184 provided that until the parole period had expired or a prisoner was otherwise discharged, a prisoner whilst released on parole should be regarded as still being "under sentence or detention and as not having suffered the punishment to which the prisoner was

sentenced or as not having undergone detention during the period for which the prisoner was ordered to be detained”.

- [6] Section 185 empowered the Queensland Community Corrections Board, or the regional community corrections board which had made the parole order, to cancel, suspend, amend or vary the prisoner’s parole. Under s 188, there was a power, exercisable in this case by the board which had cancelled the parole order, to issue a warrant directed to all police officers to apprehend the prisoner and convey him to a prison “in a case where the prisoner’s parole is cancelled – to serve the unexpired portion of the term of imprisonment ...”¹
- [7] Section 189 also provided for an application to a magistrate for a warrant to apprehend a prisoner where parole had been cancelled or suspended.² In the present

¹ Section 188 was in these terms:

Warrant for the return of prisoner to prison

188.(1) Where—

(a) a prisoner is released on parole pursuant to section 182 and the parole is cancelled or suspended by order of the Queensland Community Corrections Board or cancelled pursuant to section 187—that board; or

(b) a prisoner is released on parole pursuant to an order of the Queensland Community Corrections Board and the parole is cancelled or suspended by order of the board or cancelled pursuant to section 187—that board; or

(c) a prisoner is released on parole pursuant to an order of a regional community corrections board and the parole is cancelled or suspended by order of any such board or cancelled pursuant to section 187—any regional community corrections board;
may, as and when the occasion requires it, issue a warrant signed by any 2 of its members directed to all police officers to apprehend the prisoner and convey the prisoner to a prison there—

(d) in a case where the prisoner’s parole is cancelled—to serve the unexpired portion of the term of imprisonment or detention to which the prisoner was sentenced;

(e) in a case where the prisoner’s parole is suspended—to be kept in custody for so long as the order suspending the prisoner’s parole remains in force.

(2) A warrant issued pursuant to this section shall be sufficient authority for the apprehension and conveyance of the prisoner to a prison and for the prisoner’s detention therein pursuant to the provisions of this Act.

² Section 189 provided as follows:

Magistrate may issue warrant

189.(1) Where—

(a) a prisoner is released on parole pursuant to section 182 and the parole is cancelled or suspended by order of the Queensland Community Corrections Board or cancelled pursuant to section 187—that board or a member thereof; or

(b) a prisoner is released on parole pursuant to an order of the Queensland Community Corrections Board and the parole is cancelled or suspended by order of that board or cancelled pursuant to section 187—that board or a member thereof; or

(c) a prisoner is released on parole pursuant to an order of a regional community corrections board and the parole is cancelled or suspended by order of any such board or cancelled pursuant to section 187—any regional community corrections board or a member thereof;

may (whether or not a warrant has been issued under section 188) apply to a magistrate for a warrant directed to all police officers to apprehend the prisoner and convey the prisoner to a prison there—

(d) in a case where the prisoner’s parole is cancelled—to serve the unexpired portion of the term of imprisonment or detention to which the prisoner was sentenced;

- [8] case, no application was made under s 189 for the issue of a warrant by a magistrate.
- [9] Section 190 prescribed the effect of cancellation of parole upon the sentence, in these terms:

“Effect of cancellation of parole on sentence

190.(1) Upon the cancellation of a prisoner’s parole, the original warrant of commitment or other authority for the prisoner’s imprisonment or detention shall again be in force and no part of the time between the prisoner’s release on parole and the prisoner recommencing to serve the unexpired portion of the prisoner’s term of imprisonment or detention, other than the period (if any) during which the prisoner was kept in custody consequent upon the prisoner’s parole being suspended, shall be regarded as time served in respect of that term.

(2) The Queensland Community Corrections Board may, where a prisoner’s parole has been cancelled, by order direct that the prisoner concerned serve such part only of the unexpired portion of the term of imprisonment or detention imposed on the prisoner as is specified in the order and where the prisoner has, in accordance with any law applicable to the term of imprisonment or detention imposed on the prisoner, served the part so specified, the prisoner shall be deemed to have served that term and shall be wholly discharged therefrom.

(3) The Queensland Community Corrections Board may make an order under this subsection notwithstanding that the order pursuant to which the prisoner was released on parole was made by a regional community corrections board.”

- [10] The 1988 Act was repealed by the current Act which relevantly came into operation on 1 July 2001. Immediately prior to that date, the warrant issued by the board for the applicant’s apprehension was still outstanding, and the result of s 184 and s 190 was that the applicant had served, of his term of four years, only the time prior to his release in 1998. According to the 1988 Act then, he still had about 2½ years to serve.

(e) in a case where the prisoner’s parole is suspended—to be kept in custody for so long as the order suspending the prisoner’s parole remains in force; and a magistrate may issue such a warrant.

(2) A warrant issued pursuant to this section shall be sufficient authority for the apprehension and conveyance of the prisoner to a prison and for the prisoner’s detention therein pursuant to the provisions of this Act.

Effect of parole cancellation under the current Act

- [11] Parole is a type of post-prison community based release order,³ which can be amended, suspended or cancelled by a corrections board pursuant to s 150 which is in these terms:

“150 Amendment, suspension or cancellation of order by corrections board

(1) A corrections board may, by written order--

(a) amend, suspend or cancel a post-prison community based release order if the board reasonably believes the prisoner subject to the order--

(i) has contravened the order; or

(ii) poses a serious risk of harm either to himself or herself, or someone else; or

(iii) poses an unacceptable risk of committing an offence; or

(iv) is preparing to leave Queensland, other than under a written order granting the prisoner leave to travel interstate or overseas; or

(b) amend or cancel a post-prison community based release order if the board receives information that, had it been received before the order was made, would have resulted in the board making a different order or no order; or

(c) amend or suspend a post-prison community based release order if the prisoner subject to the order is charged with committing an offence.

(2) If the order is suspended or cancelled--

(a) the board may issue a warrant, signed by a member or the secretary of the board, for the prisoner's arrest; or

(b) a magistrate, on the application of the board or a member of the board, may issue a warrant for the prisoner's arrest.

(3) The warrant may be issued to all corrective services officers and police officers and may be executed by any of them.

(4) When arrested, the prisoner must be taken to a prison--

(a) if the order was suspended--to be kept there for the suspension period; or

(b) if the order was cancelled--to serve the unexpired portion of the period of imprisonment to which the prisoner was sentenced.

(5) The board must give the prisoner an information notice--

³ Section 141

- (a) if the order is amended--immediately after amending it; or
- (b) if the order is suspended or cancelled--on the prisoner's return to prison.

(6) The board must, as soon as practicable, consider all written submissions given to the board by the prisoner within the 21 days mentioned in the information notice and inform the prisoner, by written notice, whether the board has changed its decision, and if so, how.

(7) If the board changes its decision, the changed decision has effect.

(8) In this section--

"corrections board" means--

- (a) for a post-prison community based release order made by the Queensland board--the Queensland board; or
- (b) for a post-prison community based release order made by a regional board--the regional board that made the order or another regional board.

"information notice" means a notice--

- (a) stating that the board has decided to amend, suspend or cancel the order; and
- (b) outlining the reason for the decision; and
- (c) inviting the prisoner to show cause, by written submissions given to the board within 21 days after the notice is given, why the board should change its decision.

"suspend" means suspend for a fixed or indeterminate period."

Section 151 provides for a cancellation of an order automatically if the prisoner is sentenced to another term of imprisonment for an offence committed during the term of an order for post-prison community based release.

- [12] It will be seen that s 150(1)(a)(i) provides for a power of cancellation in a circumstance where a prisoner has contravened the relevant order for his release. Section 152 provides for the effect of cancellation of the order in that and other contexts as follows:

“152 Effect of cancellation of order

- (1) This section applies if a prisoner's post-prison community based release order is cancelled--
 - (a) under section 150(1)(a)(i) because the prisoner contravened a condition of the order; or

(b) under section 150(1)(a)(ii) because the prisoner posed a serious risk of harm either to himself or herself, or someone else; or

(c) under section 150(1)(a)(iii) because the prisoner posed an unacceptable risk of committing an offence; or

(d) under section 150(1)(a)(iv) because the prisoner was preparing to leave Queensland, other than under a written order granting the prisoner leave to travel interstate or overseas; or

(e) under section 150(1)(b) because the board received information that, had it been received before the order was made, would have resulted in the board not making the order; or

(f) under section 151 because the prisoner was sentenced to another term of imprisonment for an offence committed during the term of the order.

(2) The time for which the prisoner was released under the order before 1 of the following events happens counts as time served for the prisoner's period of imprisonment--

(a) the prisoner contravened the condition mentioned in subsection (1)(a); or

(b) the order was cancelled for the reason mentioned in subsection (1)(b), (c), (d) or (e); or

(c) the prisoner committed the offence mentioned in subsection (1)(f).

(3) The Queensland board may, by written order, direct that the prisoner serve only part of the unexpired portion of the period of imprisonment imposed on the prisoner.

(4) A regional board can not make an order mentioned in subsection (3), even if it released the prisoner.”

[13] Accordingly, had the applicant's parole been cancelled after the commencement of the current Act, then by s 152, the cancellation would have given him credit, as time served, for the period from his release until the contravention of the condition of his parole order. The question is whether s 152 also has that effect in the present case where the cancellation was made under the repealed Act.

[14] As is strongly argued for the respondent, s 152 is in terms of a cancellation of the release order being made under s 150 or s 151. That is plainly so, and apart from the effect of a transitional provision of the current Act, s 152 would have no application to the present case, because the applicant's parole had been cancelled under s 185 of the repealed Act. Absent the operation of s 152, the applicant would not be entitled to be credited for any of the period for which he was not in prison.

Transitional provisions – current Act

- [15] The applicant, who presented his own argument, relies upon s 268A which is in these terms:

“268A All release to be dealt with under this Act

(1) This section applies to a prisoner sentenced for an offence committed before 1 July 2001, whether or not the prisoner was sentenced for the offence before 1 July 2001.

(2) On and from 1 July 2001--

(a) chapters 2 and 5 are the only provisions under which the prisoner may be released before the end of the period of imprisonment to which the prisoner was sentenced; and

(b) the only requirements for the granting of the release are the requirements that apply under this Act.

(3) If, before 1 July 2001, the prisoner had any expectation to be able, after 1 July 2001, to be released before, or to be considered for a release taking effect before, the end of the period of imprisonment to which the prisoner was sentenced, the expectation is extinguished to the extent that the release is not provided for under subsection (2).

(4) Subsections (2) and (3) apply in relation to an application made by the prisoner and dealt with on or after 1 July 2001 even if the application was made before 1 July 2001.

(5) If a form of release for which the prisoner made an application before 1 July 2001 corresponds to a form of release that, after 1 July 2001, is available under chapter 5, the application must be dealt with, to the greatest practicable extent, as an application for the form of release under chapter 5, but this subsection does not authorise release before a date prescribed by section 135.

(6) This section prevails to the extent it is inconsistent with section 268 or 273.

(7) In this section--

"expectation" includes right, privilege, entitlement and eligibility.”

Because the applicant was sentenced before 1 July 2001, the section applies to him. The result is that Chapters 2 and 5 of the current Act are the only provisions under which he may be released before the end of the period of imprisonment to which he was sentenced and they are the only requirements “for the granting of the release”. That release, as referred to in s 268A(2)(b), is a reference to the release referred to in s 268A(2)(a), which is a release before the end of the period of imprisonment to which he was sentenced. But the present issue is when that period of imprisonment will or did end. Although the section applies to the applicant, it does not affect the present question.

- [16] Another transitional provision is s 268, which is headed “Authorities”. It provides as follows:

“268 Authorities

- (1) This section applies to an authority--
- (a) that was made under a provision of the repealed Acts; and
 - (b) in relation to which there is a corresponding provision under this Act; and
 - (c) that was in force immediately before the commencement of this section.
- (2) The authority continues in force according to its terms, as if it had been made under the corresponding provision of this Act, with the changes necessary--
- (a) to make it consistent with this Act; and
 - (b) to adapt its operation to the provisions of this Act.
- (3) In this section--
- "authority" means an approval, authorisation, certificate, classification, decision, declaration, determination, direction, delegation, guideline, home detention instrument, leave of absence instrument, parole or other order, permit, policy, procedure, register, transfer instrument or other authority.”

The term “repealed Acts” includes the *Corrective Services Act 1988*.

- [17] It can be seen at once that the term “authority” for this section is defined broadly: it includes a parole order but it includes also any “other order” as well as a “decision”, although such a decision would have to be one which could be seen as in some sense authoritative and which had an operation which was current “immediately before the commencement of this section”.
- [18] It is by s 268 that, for example, a parole order which was in force upon the commencement of the current Act continues as a parole order as if made under the corresponding provision of the current Act [with such changes as is necessary to make it consistent with this Act and to adapt its operation to its provisions]. Accordingly, a parole order could be cancelled under the current Act although it had been granted under the repealed Act. Had the applicant’s parole order been cancelled not in August 2000, but in, say, July 2001, it is clear that the cancellation would have been pursuant to s 150, with the beneficial consequence for him from s 152. Upon the respondent’s argument, the legislative intention, however, was to deny a prisoner the benefit of s 152 where, as here, the cancellation had predated the commencement of the current Act.

- [19] The questions then arising are whether the order which cancelled the applicant's parole is an "authority" within s 268, and if so, what is the effect of that section?
- [20] By the terms of s 190 of the repealed Act, upon the cancellation of a prisoner's parole the original warrant of commitment or other authority for the prisoner's imprisonment was again in force. The relevant authority for this prisoner's imprisonment was the order of the District Court made on 8 May 1997 by which he was sentenced. The cancellation of the parole was not in itself the authority for the further imprisonment of the applicant. But at least in one respect, the cancellation order had a continuing operation. As I have mentioned, in the context of a cancellation of parole, s 188 and s 189 each permitted the issue of a warrant for the apprehension of the prisoner and the conveyance of him to a prison. Section 188, which permitted the relevant corrections board to issue a warrant, was invoked in this case when a warrant was issued for the applicant's apprehension on 31 August 2000. But the cancellation order also permitted an application to be made to a magistrate for the issue of a warrant pursuant to s 189. A warrant could have been sought from the magistrate although a warrant had already been issued by the relevant board. A warrant issued by a magistrate would then have had an advantage which a warrant issued by the board would not have had, which was that the magistrate's warrant could have authorised the prisoner's apprehension in another State under the *Service and Execution of Process Act 1992* (Cth). Until the amendment of that Act in 2003⁴ it permitted a person named in a warrant issued in a State to be apprehended in another State only where the warrant was one issued by a court, a judge, a magistrate, coroner or other court officer.⁵ The magistrate's power to issue a warrant under s 189 depended upon the continued operation of the cancellation order.
- [21] At least in that way then, the cancellation order had a continuing operation as at the commencement of the current Act. It was an order in the nature of a continuing "authority", at least because it authorised an application to a magistrate pursuant to s 189 of the repealed Act. Accordingly, it was in force immediately before the commencement of the current Act (and s 268). And the cancellation order was an authority in relation to which there is a corresponding provision under the current Act, which is s 150. It follows that the cancellation order was an authority to which s 268 applies.
- [22] According to s 268(2) then, the cancellation order continued in force according to its terms, as if it had been made under s 150, with the changes necessary to make it consistent with the current Act and to adapt its operation to the Act's provisions.
- [23] One example of the effect of s 268 was in the issue of a magistrate's warrant for the applicant's arrest on 28 October 2002. It was by that warrant that the applicant was able to be apprehended in Victoria on 6 May 2003 and brought back to prison in Queensland. That warrant was issued after the commencement of the current Act, and therefore pursuant to s 150(2)(b), for there was no other authority for the magistrate to issue it. The warrant was valid because s 268 required the cancellation

⁴ By the *Crimes Legislation Enhancement Act 2003* (Cth), s 3 Schedule 2, Cls 18-22

⁵ Then definition of "warrant" in s 3

of parole to be treated as if it had been made under s 150(1). This example indicates at least one reason why the Parliament would have intended an order made under the repealed Act for the cancellation of parole to have a continuing operation as if made under the current Act.

- [24] Once it is seen that the cancellation order is an “authority” to which s 268 applies, the evident intention of that section is to give that order, as far as possible, the effect it would have had if it had been made under s 150 of the current Act. So upon the arrest of the applicant, s 150(4) was engaged, and it was in consequence of that provision that the applicant had to be taken to a prison “to serve the unexpired portion of the period of imprisonment to which the prisoner was sentenced”. And s 150(5) was engaged, so that on the applicant’s return to prison, he was to be given an “information notice” inviting him to show cause why the decision to cancel his parole should be changed. Accordingly, a notice was given by the West Moreton Regional Community Corrections Board to the applicant on 15 May 2003 expressly as an information notice under that provision.
- [25] What then was the “unexpired portion of the period of imprisonment to which the prisoner was sentenced” which the applicant was required to serve according to s 150(4)? As the cancellation order was to be treated in all respects as if it had been made under s 150, was s 152 engaged? Or should s 152 be interpreted as applying only if the source of power for the cancellation order, when it was made, was s 150?
- [26] Clearly the legislature has seen it appropriate to allow a prisoner, whose parole is cancelled, the benefit of time served on parole before the event which caused its cancellation. That represents a substantial shift in policy from the repealed Act. It is difficult to identify a reason why that policy would have been considered appropriate in the case of prisoners whose parole was cancelled after the new Act commenced, but inappropriate for prisoners such as the applicant whose parole had been cancelled earlier but who were still affected by whether credit was given for their time on parole. A comparison of the respective regimes for early release, and in particular release on parole, between the repealed Act and the current Act does not reveal any such reason. It was suggested, in the course of the respondent’s argument, that the beneficial operation of s 152 reflected some legislative balancing exercise for the impact of the current Act upon the process of remission of sentences. But that does not at all appear from the terms of the current Act or the relevant materials such as the Minister’s Speech or the Explanatory Memorandum.
- [27] As the legislature has seen fit to implement a policy that prisoners be allowed the benefit of their time on parole notwithstanding its cancellation, the more likely legislative intention was to have that policy applied to all prisoners for whom the question would still be relevant. That is consistent with the language of s 268, which is to make an authority, including a parole cancellation order, continue to operate as if made under the corresponding provision of the current Act. In my conclusion, s 268 has the effect that a cancellation order still in operation at the commencement of the current Act, continued to have effect in all respects as if made under the corresponding provision in s 150 or s 151, and that it is to be treated as a cancellation order under that provision so as to engage s 152. The alternative interpretation, which I reject, is that s 268 operates to have the cancellation order

treated for some purposes and for some provisions of the current Act as if made under it, but not for the purpose of the operation of s 152.

- [28] The result is that s 152 applies to the applicant's case, and the time for which the applicant was released on parole before he contravened the relevant condition of his parole counts as time served for his period of imprisonment pursuant to s 152(2). I declare that the period from 23 November 1998 until 16 May 2000 counts as time served for the applicant's period of imprisonment under the orders of the District Court made on 8 May 1997. I shall hear the parties as to any consequential orders.