SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hood* [2005] QCA 159
PARTIES:	**R** **v** **HOOD, Dean Christopher** (applicant/appellant)
FILE NO/S:	CA No 38 of 2005 DC No 146 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	13 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2005
JUDGES:	McPherson and Jerrard JJA and Helman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal against sentence granted** **2. Appeal allowed** **3. Sentence imposed for burglary on count 1 varied by deleting the recommendation that the applicant be eligible to apply for a post-prison community based release order after serving nine months, and order instead that that sentence be suspended after nine months** **4. Sentence imposed on count 2 for unlawful assault occasioning bodily harm be set aside and order instead pursuant to s 92(1)(b)(ii) that the applicant be sentenced to a term of imprisonment for nine months and that at the end of that term be released under the supervision of an authorised Corrective Services officer for a period of two years, it being a term of that order that the applicant undergo and complete as directed a cognitive skills program, an anger management program, and a re-offenders' program** **5. Sentences imposed on counts 4, 6, and 7 for unlawful assault and deprivation of liberty be set aside and in lieu thereof sentences of nine months imprisonment be imposed**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – applicant pleaded guilty to burglary with actual violence, assault occasioning bodily harm, assault and deprivation of liberty offences – sentence of 27 months imprisonment imposed with a recommendation for post-prison community based release after nine months – whether the sentence should have been suspended after nine months instead of the recommendation

PROCEDURE – COURTS AND JUDGES GENERALLY – PRECEDENTS – PRECEDENTS GENERALLY – REVIEW BY COURT OF OWN DECISIONS – applicant sought a sentence suspension after nine months followed by an intensive correction order for an 18 month period – s 112 *Penalties and Sentences Act* 1992 (Qld) prohibits this order – recommendation for parole eligibility could not be given effect for administrative reasons – concern that applicant would be required to remain in prison well past the recommended parole date to complete rehabilitation programs – previous Court of Appeal decision held that suspended sentences cannot be ordered concurrently with probation orders for the same or other offences – whether that decision should be reversed

Corrective Services Act 2000 (Qld), s 141, Sch 3
Penalties and Sentences Act 1992 (Qld), s 92, s 112

Queensland v The Commonwealth (1977) 139 CLR 585, applied
R v A and S; ex parte A-G [1999] QCA 503; [2001] 2 Qd R 62, considered
R v Arana [2000] QCA 184; CA No 441 of 1999, 16 May 2000, considered
R v Daly [2004] QCA 385; (2004) 147 A Crim R 440, considered
R v Craig Hughes [2000] QCA 16; CA No 306 of 1999, 11 February 2000, reversed
R v Hughes [1998] QCA 61; [1999] 1 Qd R 389, considered
R v Lihou; ex parte A-G [1975] Qd R 44, considered
R v M; ex parte A-G [1999] QCA 442; [2000] 2 Qd R 543, considered
R v Mackenzie [2000] QCA 324; [2002] 1 Qd R 410, considered
R v Sysel [2000] QCA 233; CA No 8 of 2000, 16 June 2000, considered
R v Vincent; ex parte A-G (Qld) [2000] QCA 250; (2000) 112 A Crim R 433, considered
Sysel v Dinon [2002] QCA 149; [2003] 1 Qd R 212, considered

COUNSEL: The applicant/appellant appeared on his own behalf
D Meredith for the respondent

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

[1] **McPHERSON JA:** The appellant Dean Hood was sentenced for each of various offences to concurrent terms of imprisonment for 27 months with a recommendation that he be eligible for parole after serving 9 months. It is apparent that from the outset the recommendation could not be given effect.

[2] For the Crown, Mr Meredith of counsel accepted that some other sentencing order would have been appropriate. The most suitable in the circumstances of the appellant as explained in the reasons of Jerrard JA is the order proposed by his Honour in para 49 of those reasons. I regard s 92 of the *Penalties and Sentences Act 1992*, as construed by this Court in *Sysel v Dinon* [2003] 1 Qd R 212, as authorising the making of such an order in this case. I accordingly agree that the application and appeal should be allowed and that an order in those terms should be made.

[3] **JERRARD JA:** On 2 February 2005 Dean Hood pleaded guilty to the burglary of Patrick Howard's dwelling, with the aggravating circumstance that he used actual violence. He also pleaded guilty to unlawfully assaulting Kristopher Howard and doing him bodily harm, to unlawfully assaulting Patrick Howard, and to offences of unlawfully depriving each of Patrick and Kristopher Howard of their personal liberty. On each count he was sentenced to 27 months imprisonment, and the learned sentencing judge recommended that Mr Hood be eligible to apply for a post-prison community based release order after he had served nine months of that sentence. Mr Hood has applied for leave to appeal against those sentences, apparently in respect of all counts.

[4] The grounds of appeal read as follows:

(a). The Defence were not afforded the opportunity to make submissions upon the appropriateness of a partial suspension of the period of imprisonment to be imposed, as opposed to a recommendation for post-prison community based release.

(b). The sentencing discretion miscarried because the Learned Sentencing Judge without notice to the Defence ordered a recommendation for post-prison community based release as opposed to the partial suspension that had been sought.

(c). To the extent that the period of imprisonment was not the subject of a partial suspension as opposed to a recommendation for post-prison community based release after serving 9 months, the sentence is in all the circumstances manifestly excessive but otherwise is within range.

[5] It was apparently conceded in those grounds, and was specifically conceded by Mr Hood who appeared in person, that the 27 months is not manifestly excessive. The complaint is that the learned judge ought to have suspended the sentence after nine months rather than recommended consideration for varieties of post-prison

community based release. Those are defined in s 141 and Sch 3 of the *Corrective Services Act* 2000. The effect of the learned judge's order is that a regional community corrections board, established pursuant to Div 2 of that Act, would determine if Mr Hood is granted one or more of those varieties of release into the community.

Background circumstances

[6] The offences Mr Hood was sentenced for in February 2005 were all committed on 27 March 2004. At about 6.30 pm on the evening of that day he went to Patrick Howard's home and forced his way in, damaging a screen door. Kristopher Howard, who apparently lived there too, asked his de facto partner to call the police, but instead she went to look after their two year old daughter. Mr Hood accused Patrick Howard and his brother Kristopher of having insulted Mr Hood's family and called them dogs; he then punched Kristopher Howard in the face, causing his top lip to split and bleed. He then attempted to have Patrick Howard fight him, repeated that they had both called him and his family dogs, and ran outside. One or other of Patrick or Kristopher Howard called the police, but then Mr Hood re-entered the home, brandishing a Japanese sword between 60 cm to 70 cm in length and with a blade 5 cm wide, tapering to a point.

[7] Mr Hood swung that sword around in a menacing way, remarking that it would be easy to cut off Patrick Howard's head, said with the sword being swung close to Patrick Howard. That conduct was the subject of the count of unlawful assault of Patrick Howard; the punch to Kristopher was the subject of the charge of assault causing him bodily harm.

[8] Mr Hood then told both the Howards that they were to come with him, and that if they did not he would come back and kill both of them. He said he would get one of "Kevin's" guns, Kevin being a kangaroo shooter known to the Howards, and believed by both of them to possess weapons. The Howards accordingly left the residence and followed Mr Hood's vehicle in their own. They contended they did so because he was still armed with the sword, and Kristopher's de facto partner and young daughter were still within the house, and both complainant males said they feared for the safety of the woman and child.

[9] Mr Hood led the way to a shopping centre (this is the basis of the deprivation of liberty charges) and when the car stopped and passengers all alighted, attempted to arrange a fight between Patrick Howard and another man, but those two declined to fight. Mr Hood then removed his shirt and offered to fight both the Howard men, but Patrick ran away and successfully escaped pursued by Mr Hood, who returned and attempted to engage Kristopher Howard in a fight. Kristopher refused to fight him and was then allowed to go on his way by Mr Hood.

[10] The complainants reportedly made it clear, at the relatively short committal hearing which ensued after Mr Hood had been arrested, that they found Mr Hood's conduct surprising, in that they both considered it was out of character because the Howard and Hood families had been friends for many years. Mr Hood's counsel informed the learned sentencing judge that what had upset Mr Hood was information that the complainants had been heard to say that Mr Hood had behaved indecently toward the complainants' younger sister. Mr Hood had learned that information only

shortly before attending at the complainants' residence, and he was adversely affected by alcohol when he did so.

Mr Hood's prior offending conduct

[11] Mr Hood had been involved in a motor vehicle accident in which his work mates, some of whom were both close friends and relatives, had died. He himself was injured, and had additionally suffered the experience of being unjustly accused of being the cause of the tragic events. Whether unrelated to that or not, a psychiatric assessment made in 2001 and provided to the learned sentencing judge by Mr Hood's counsel described Mr Hood's past medical history as including polysubstance abuse, and the report included the observation that while his prognosis with regard to an episode of depression and post traumatic distress disorder was good (in 2002), his problems of anti-social personality disorder, conduct disorder, and substance abuse would lead to a poor prognosis for aspects of his life. That pessimistic observation was borne out by Mr Hood's record of criminal offending behaviour. On 22 December 1999 he was sentenced in the District Court (coincidentally, by the same judge who imposed sentence on 2 February 2005) for offences of wilful damage, assault occasioning bodily harm while armed, and receiving stolen property. He was placed on three years probation. Those offences were committed in July, August, and September of 1999.

[12] He then appeared in the Toowoomba Magistrates Court on 9 July 2001, and was dealt with for insulting words and obstructing a police officer, committed in June 2001, and for a breach of the probation order imposed in December 1999. The Magistrate ordered that that order continue. Then Mr Hood appeared in the Toowoomba Magistrates Court in February 2002, when he was dealt with for offences of receiving stolen property, fraud, and possession of weapons, all committed before his earlier appearance on 9 July 2001. He was placed on 40 hours community service. On 4 June 2002 he appeared again in the Toowoomba District Court, and was dealt with for a substantive offence and for a second breach of the probation order imposed on 22 December 1999. The substantive offence was going armed in public on the evening of 27 April 2002, on which night he had approached two people who had made a complaint about his brother to the police. Mr Hood was armed with an iron bar. The learned judge imposing sentence on 4 June 2002 remarked that the complaint to the police by Mr Hood's victims had been legitimate, in that Mr Hood's brother had assaulted one of those two people, earlier in the night. Nevertheless, Mr Hood followed them to their residence and yelled out words to the effect that he now knew where they lived. As the sentencing judge observed, that must have been a serious concern to those people. That offence is echoed in various ways in the more serious conduct constituting the offences committed two years later on 27 March 2004, in that Mr Hood once again went to another person's dwelling with a sense of grievance, but this time he went in, used actual violence, and threatened more violence, with a weapon.

[13] On 4 June 2002, the sentencing judge noted that Mr Hood had already been dealt with for a breach of the probation order, that he had completed the ordered 240 hours community service that had originally accompanied the probation order, and that he had actually achieved a glowing report by the supervisor of that community service. Nevertheless, it was of concern that he continued to re-offend. Accordingly, the judge made an order for the performance of another 60 hours of community service.

[14] On 19 September 2002 Mr Hood was dealt with in the Oakey Magistrates Court for breaching the community service order imposed in the Magistrates Court in February 2002. He was fined $300. Next month, on 11 October 2002, he was dealt with in the Toowoomba District Court for a breach of the community service order imposed by that court on 4 June 2002. He was fined $750, and the community service order was continued.

[15] Two months later, on 19 December 2002, Mr Hood was dealt with in the Oakey Magistrates Court for unlawful possession of a weapon, shortening a firearm, and for an offence relating to the storage of weapons. All those offences were committed on 3 December 2002. Accordingly, on 10 January 2003 Mr Hood appeared again in the Toowoomba District Court, and was dealt with for a second time for breaching the community service order imposed on 4 June 2002. This time the District Court set aside the extending order made three months earlier on 10 October 2002, and ordered instead that for each original offence (the ones for which he got three years probation in 1999) Mr Hood was sentenced to six months imprisonment, to be suspended after five days for a period of 12 months. Five days pre-sentence custody from 5 January to 9 January 2003 was declared to be imprisonment already served under the sentence. Mr Hood was warned that that was the absolutely last chance he would be given; and that if he did not behave himself for 12 months he would be brought back, and the Crown would ask to have the unserved 25 weeks imprisonment activated.

[16] Mr Hood did succeed in not re-offending for 12 months, but 13 and a half months later, on 22 February 2004, he committed an offence of common assault for which he was dealt with in the Toowoomba Magistrates Court on 21 July 2004. He was fined $1,530. In the meantime, on 27 March 2004, he had committed the offences to which he pleaded guilty and was sentenced on 2 February 2005, those being the subject matter of his present application.

Sentencing remarks

[17] The learned judge stated when passing sentence in February 2005 that courts had structured orders in Mr Hood's interests on a number of occasions, had made repeated allowances for Mr Hood's personal circumstances, and that Mr Hood had run out of chances. The judge referred to the 22 December 1999 convictions for assault occasioning bodily harm while armed and for dishonesty offences, and to the history of Mr Hood's re-offending behaviour. The learned judge remarked that it was likely that Mr Hood was on bail, resulting from the offence of common assault committed on 22 February 2004, when he re-offended in March 2004. The judge added that courts view it seriously when an offender entered another person's home with the intention to commit an indictable offence, and that Mr Hood had done so and caused minor damage and bodily injury, as well as having threatened violence with a dangerous weapon.

[18] The learned judge then referred to the contents of the psychiatric opinion, to Mr Hood's personal problems and concerns arising out of the fatal accident in which he had been involved, and stated that nevertheless the judge was obliged to impose a substantial custodial head term. There is no complaint about that head sentence on this application, and the complaint made instead in the grounds of appeal is that the learned judge, before recommending eligibility for a post-prison community based release order after nine months, had not first invited submissions from the

applicant's counsel as to whether that order was appropriate, as opposed to suspension of the sentence after nine months. The applicant's counsel had indeed urged that whatever term of imprisonment be imposed – and counsel suggested that the head sentence should be no more than 18 months – that it be suspended at an appropriate time. Counsel had informed the learned judge that Mr Hood was in employment, and had tendered a report from Mr Hood's employer verifying that fact, and that he was currently supporting his de facto partner and three children.

[19] Counsel informed the court that Mr Hood, who was educated to grade nine level at Mt Lofty school, was unable to read or write, and that his three children (aged 4, 3, and 1) had been born in a de facto relationship with the children's mother, which had been "on and off" for the last nine years. Mr Hood was only 22 when sentenced.

Mr Hood's grounds of appeal

[20] Putting aside his convictions in the Toowoomba Magistrates Court for what might be termed street offences in January and July 2001, Mr Hood succeeded in lasting 18 months without re-offending by criminal conduct after having been placed on probation in December 1999, the re-offending being in May and June of 2001. The next longest period without re-offending by committing indictable offences was the 13 months beginning in January 2003 when he was completing the operative period of a suspended prison sentence. A partly suspended sentence has therefore had effect as a deterrent on Mr Hood, but not quite as much as the benefit apparently gained from supervision in the community. Accordingly, there was no obvious error made by the learned sentencing judge when choosing an order that would potentially result in Mr Hood receiving supervision and counselling when next released. Mr Hood would need to satisfy a community corrections board that it was appropriate he be released; but that is a permissible objective of a community corrections system. That is, Mr Hood would have to set about taking the steps necessary to satisfy the regional board that he was an appropriate candidate, and the need to do that is not a valid ground for complaint about a sentence.

[21] The only relevant issue in the grounds of appeal is the minor premise which argues that the order made was rendered invalid because the judge did not invite submissions on the choice between automatic suspension after nine months, or possible community based release after that time subject to the discretionary judgment of an independent board. The applicant submits by implication in those grounds that the invalidity results from a denial of procedural fairness. But upholding that submission would require that every judge imposing sentence invite submissions on all sentence options realistically available, as opposed to the present practice whereby legal representatives make the submissions those representatives regard as relevant, urging therein the orders considered to be in the client's interest. A judge can invite submissions as to the content or form of the appropriate orders, but it seems a sterile exercise to require that a judge always invite submissions between two courses where each may be appropriate and when neither is inappropriate, and where the choice is essentially a matter for the discretionary exercise of the judge's sentencing powers.

[22] Mr Hood's counsel did not remark in his submissions to the sentencing judge on any matter which might have suggested the order made was inappropriate. The grounds of appeal do not contend that possible early release was not available to Mr

Hood, or that any particular reason existed when he was sentenced which would make it unlikely that he would be considered for community based release as recommended. In those circumstances there is no merit in the written grounds of appeal.

Mr Hood's oral argument

[23] On the hearing of the appeal Mr Hood informed the court by an unsworn affidavit, which he was permitted to read, that while he had no complaint about the head sentence, he asked that it be suspended after nine months, to be followed by an intensive correctional order for a period of 18 months. Regrettably, an order in those terms is not available by reason of s 112 of the *Penalties and Sentences Act* 1992, ("the Act"), which only permits a court to make an intensive correction order when sentencing an offender to a term of imprisonment of one year or less.

[24] Mr Hood also further asserted that "sentence management" within the Woodford Correctional Centre where he is incarcerated had recommended to him that he complete a cognitive skills program, an anger management program, and a re-offenders' program. Those all seem relevant to his chances of avoiding re-offending. He has applied to do those programs and is awaiting acceptance, but has been advised that he may not have completed them by the time he should lodge his parole application, namely three months before it is heard. If the application is lodged before the programs are finished, this may adversely affect his chances of parole. Mr Hood appeared genuinely worried that he would stay in custody doing those courses well past the recommended parole date. Counsel for the DPP accepted that Mr Hood's information might well be accurate, and his concerns soundly based. If so, this raises a variety of the problems dealt with by this Court in *R v MacKenzie* [2002] 1 Qd R 410, and *R v Maxfield* [2002] 1 Qd R 417.

[25] In the former case this Court heard an application from a person sentenced to imprisonment with a recommendation for consideration for early release, where the sentencing court had acted under the factual error that the recommendation could be, even if it might not be, given effect to.[1] It appears in this application that by reason of the number of persons applying for acceptance to those recommended courses Mr Hood may not be considered eligible for parole after nine months; rather he will be considered eligible on completion of the recommended courses, which may happen an unknown period of time later than nine months after the imposition of his sentence. There is a foreseeable risk that effect will not be given to the recommendation, for a reason beyond Mr Hood's control[2] and that accordingly the recommendation does not in reality qualify as a reduction of sentence, contrary to the assumption of the sentencing judge. In *R v MacKenzie* this Court held the error in the assumption enlivened the power under s 188(1)(c) of the Act; in *R v Daly* [2004] QCA 385 at [6] and [9] that the error meant the sentencing discretion had miscarried, and (at [31]) that it meant some other sentence was warranted in law and should have been passed.

What orders could be made?

[26] The difficulty lies in making an appropriate order. There is every reason to consider that the community and Mr Hood will benefit if he does complete those programs

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1 *R v MacKenzie* at [11], [12] and [29]

2 *R v Maxfield* at Qd R 423

and that doing so should be a condition of his return to the community. But since he is only 22 years old it is also desirable that he be released from imprisonment as soon as is compatible with deterrence and community benefit. One suggestion discussed during the hearing of his application was that, to achieve the object of the learned judge's sentence, the sentence imposed be varied, so that:

- Mr Hood remained sentenced to 27 months imprisonment on the charge of burglary, suspended after nine months;
- Mr Hood was sentenced to nine months imprisonment on the count of assault occasioning bodily harm, to be followed by three years probation, it being a term of that order that as directed he undergo and complete the recommended programs in the community;
- Mr Hood be sentenced to concurrent terms of nine months imprisonment on the offences of assault and of deprivation of liberty.

[27] Those orders if made would both provide Mr Hood with a substantial incentive against re-offending, namely the suspended sentence, and also provide a lengthy period of supervision, linked with the capacity to order completion of the suggested programs. However, there are substantial difficulties in making those seemingly sensible orders, occasioned by prior decisions of this Court.

[28] In *R v Lihou; ex parte Attorney-General* [1975] Qd R 44 the Court of Criminal Appeal followed a decision in *Reg v Evans* [1958] 3 All ER 673, where the English Court of Criminal Appeal expressed the view that a probation order should not be made concurrently with a sentence of detention in a Detention Centre. The court in *Evans* thought that combination of orders was contrary to the spirit and intention of the provisions of the *Criminal Justice Act* 1948 (UK) providing for probation, and also those providing for detention, or "borstal". In *Lihou*, following the decision in *Evans* resulted in the Court of Criminal Appeal holding that it was an error to impose a sentence of two years probation in respect of one offence, and concurrent sentences of nine months imprisonment in respect of 15 others. The terms of the relevant probation legislation in 1975 required a probationer to report in person within 24 hours of release from the court; that made it impossible to comply with the probation order while in prison.

[29] In *R v Hughes* [1999] 1 Qd R 389 this Court held that a sentence of imprisonment of two and a half years with a recommendation for consideration for release on parole after six months could not properly be joined with a sentence for immediate release to three years probation in respect of a different offence. In *Hughes*, after considering the earlier decision in *Lihou*, this Court held that it was neither permissible or proper to make a probation order to operate concurrently with a sentence of imprisonment, except to the extent specifically permitted under s 92(1)(b) of the Act. Provision is expressly made in that subsection for a sentence to a term (now, no longer than 1 year) of imprisonment, on any one count, to be followed by probation for at least nine months but no more than three years, for that same count.

[30] The orders overturned in each of *Lihou* and *Hughes* had combined actual immediate imprisonment of at least six months on one or more offences with orders for immediate undergoing of a probation order for a different offence. Since then in a variety of situations this Court has somewhat enlarged upon the effect of the

decision in *Hughes*, where that decision did not necessarily require the result reached. In *R v M; ex parte A-G* [1999] QCA 442 this Court heard an appeal in which an intensive correction order had been imposed on one count, concurrently with a probation order on another. This Court held that because the express terms of s 113 of the Act provided that the effect of an intensive correction order is that the offender is serving a sentence of imprisonment in the community and not in a prison, an intensive correction order is a term of imprisonment. The Act gives power to an authorised officer to detain an offender by requiring residence at residential facilities for periods not longer than seven days at a time. There was accordingly the potential for a conflict to arise in the operation of a probation order with an intensive correction order.[3] I observe that potential for conflict was an essential part of the reasoning which held those orders were inconsistent.

[31] In *R v A and S; ex parte A-G* [2001] 2 Qd R 62 this Court heard applications where juvenile offenders had been sentenced pursuant to the *Juvenile Justice Act* 1992, and sentenced to terms of three years probation on one count, and to concurrent terms of two years detention with an immediate release order on another count. On yet another, community service was ordered. The joint judgment of the President and Thomas JA held[4], after referring to *Evans*, *Lihou*, *Hughes*, and *M*, that the scheme for making probation orders in respect of adult offenders set out in Part 5 of the *Penalties and Sentences Act* 1992 did not permit a probation order to operate concurrently with a sentence of imprisonment, other than as provided in s 92(1)(b) of that Act. However, the majority held, the sentencing regime under the *Juvenile Justice Act* was different. Those observations were obiter with respect to the Act.

[32] In *R v Craig Hughes* [2000] QCA 16 this Court heard an application in which the judge had imposed a sentence of three years imprisonment on each of two counts, suspending each after 278 days of pre-sentence custody declared to be time already served; and on another count had ordered three years probation. The result of the orders made was that that applicant was then entitled to immediate release, and would have been both on probation for one offence, and undergoing the operative part of a suspended term of imprisonment on two other offences. All three judges hearing that application (Pincus JA, Thomas JA, and Helman J) joined in overturning those orders on the ground that the learned sentencing judge had been in error in making a probation order and an order of imprisonment run concurrently, which those learned judges thought an impermissible combination, consistently with the decisions in *Lihou* and *Hughes,* and Pincus JA cited the obiter comments in *A and S.* I respectfully observe that the original impermissibility found in *Lihou* and *Hughes* was between orders for both actual imprisonment and immediate release on probation, taking effect at the same time. When a person goes to prison as a result of an order, and is to remain there for a considerable time, while also being on probation, there is no conduct in the outside world or in the prison which the probation order could immediately affect, benefit, or change. There is therefore a self-evident inconsistency in ordering immediate release on probation and immediate imprisonment; but that is now authorised by s 92(1)(b) of the Act as construed by this Court in *Sysel v Dinon* [2003] 1 Qd R 212, discussed below.

[33] That same evident inconsistency would not have resulted from the orders which were overturned in *R v Craig Hughes*, where that applicant was released into the

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3 McPherson JA at [3]; Davies JA at [11]; Jones J at [40] and [41]

4 At [23]

community as a result of the orders made, and could by lawful conduct thereafter have complied with the requirements of both varieties of order. The observation from *A and S,* cited and relied on in *R v Craig Hughes*[5], went further than was necessitated by the actual result in *Hughes,* or *Lihou,* (or *M* for that matter).

[34] In *R v Arana* [2000] QCA 184 an applicant had been sentenced to three years probation and 240 hours community service on 37 counts, and to a concurrent sentence of six months imprisonment, suspended for three years, on 11 others. The Chief Justice held that order was inconsistent with *R v Craig Hughes.* In *R v L; ex parte A-G* [1998] QCA 468 the Chief Justice had earlier expressed the obiter and tentative view that in that situation while a sentence remained suspended a defendant was able to comply with the requirements of a concurrently operating probation order, so that the difficulty identified in *Hughes* would not necessarily arise. In *Arana* the Chief Justice followed the decision in *R v Craig Hughes*.

[35] The President also held in *Arana* that *R v Craig Hughes* has the effect that a non-custodial sentence cannot stand contemporaneously with a suspended sentence under the present adult sentencing regime, and further stated that she considered that regrettable, and that she had remarked on this on a number of other occasions. She suggested legislative intervention was necessary to remedy the result of that decision, for it meant that a sensible sentencing package (combining the benefits to both the offender and the community of probation, and perhaps community service, with the added "big stick" of a suspended sentence) could not be ordered, and was unlawful.

[36] Thomas JA[6] in *R v Craig Hughes* had described the principle expressed in *Hughes* and *R v M,* as sometimes being inconveniently restrictive, and also remarked that in the case then being considered the combination of the sentences imposed represented a satisfactory result that was quite workable. In *R v Vincent* (2000) 112 A Crim R 433 this Court wrote (at 436), in response to a submission that it was not open to impose an order for suspended imprisonment in conjunction with a community service order, that its earlier decisions did not expressly hold such a combination of orders to be unlawful, and that there was no necessary inconsistency in the imposition of a community service order with the concurrent imposition of a suspended imprisonment order of short duration. This court held that it was neither necessary nor desirable to extend the restrictive effect of *Hughes* into the sentencing options then under appeal.

[37] There has been a development in the construction of s 92(1)(b) of the *Penalties and Sentences Act* which necessarily affects the reasoning on which *R v Craig Hughes,* and the decisions which have applied it, was based. In *R v Sysel* [2000] QCA 233, this Court heard an application for leave to appeal from a judgment of the District Court, itself hearing an appeal from the Magistrates Court. There a variety of sentences had been ordered, including orders for community service, probation, short sentences entirely suspended, short sentences suspended after three months, and orders for fines. This Court remarked that a three year probation order could co-exist with an order for three months imprisonment, and that this followed from s 92(1)(b) itself, and from s 92(2). However, when considering s 92(5), which provides that a term of imprisonment imposed under s 92(1)(b)(i) must not itself be

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5 By Pincus JA at [6]

6 At [13]

suspended, this court held in *R v Sysel* it was clear that restrictions in s 92 on the imposition of imprisonment concurrently with probation had been treated in the past as applicable to groups of offences dealt with on the same occasion; and held that it followed that the imposition of suspended sentences on other offences imposed at the same time as a probation order must be treated as prohibited by s 92(5). This Court's judgment in that case was short, and while it did not enlarge upon what appeared to have been its reasoning by analogy, the result was in accord with the decision in *Craig Hughes.*

[38] The sentences then under consideration in *R v Sysel* then fell for further reflection in this Court in *Sysel v Dinon* (supra), when this Court declined to re-open them. In the course of this Court's judgment Muir J made a careful analysis of s 92(1)(b), observing that it expressly permitted the making of a probation order with a concurrent term of imprisonment where that sentence was for longer than (now) 12 months. His Honour held, and Williams JA agreed (as apparently did McPherson JA) that (at [32]):

> "There is nothing in s 92(1)(b) which requires the conclusion that an offender can not be sentenced to a [12] month term of imprisonment for each of two or more separate offences and be subjected to probation orders in respect of one or more of the same offences. Once this is accepted, there would seem to be no compelling reason why, for example, an offender sentenced to a term of imprisonment of [12] months for each of two offences being dealt with at the same time as a third offence, could not be subjected to a term of probation in respect of the third offence without a further term of imprisonment being imposed.
>
> [33] In such a case there would be no incompatibility between the sentences for terms of imprisonment and the concurrent term of the probation order. Section 92(1)(b) acknowledges, implicitly, that a probation order may be made, the requirements of which do not commence until the offender is released from imprisonment."

[39] In *R v Daly* [2004] QCA 385 I wrote that it necessarily follows from *Sysel v Dinon* that for valid sentences of imprisonment and probation to be imposed at the same time, the maximum term of imprisonment that can be ordered is 12 months. The other judges constituting the Court in that case did not disagree. I also suggested that this Court seemed to be moving (in its decision in *R v Vincent*) toward a reconsideration of the result in *R v Craig Hughes*, and towards the position that this Court asks merely whether two or more different sentences are necessarily incapable of all being the subject of compliance, as was the case in *R v Lihou*. McPherson JA in *R v Daly* left to a different occasion and another case the consideration of whether and to what extent previous decisions of this Court concerning the consistency or inconsistency of combining various diverse sentencing options ought to be reviewed. I suggest that this is an appropriate case in which to do so.

[40] There are now a variety of permitted and prohibited sentencing orders, difficult either to reconcile or to justify. The construction of s 92(1)(b) reached in *Sysel v Dinon* means that the orders declared to be prohibited in *R v Lihou* – concurrent sentences of nine months imprisonment in respect of 15 matters, and a sentence of two years probation in respect of another – are now expressly authorised, and the

actual result in the case upon which all subsequent reasoning has been based has accordingly been reversed by judicial construction of the now applicable legislation.

[41] At present:

- concurrent sentences of up to 12 *actual* months imprisonment can be imposed at the same time as orders for immediate probation are made on other counts (*Sysel v Dinon*); but
- a sentence of up to 12 months served as an intensive correction order cannot be made concurrent with a probation order of any length (*R v M*); and
- orders for *suspended* sentences (of any length) cannot be made concurrently with orders for sentences of probation for either that same offence (s 92(5)), or for any other offences (*R v Sysel*), (*R v Arana*), (*R v Craig Hughes*); yet
- orders for community service can be made concurrently with orders for short terms of imprisonment, wholly (or partly) suspended (*Vincent*).

Should *R v Craig Hughes* be reconsidered?

[42] In that list of permitted and prohibited orders the most obviously odd one out is the prohibition on making concurrent orders for probation and suspended sentences for different offences. The underlying justification for that prohibition was removed by the approach taken in *Sysel v Dinon*, and this Court should now consider whether the sentencing principle enunciated in *R v Craig Hughes* should be abandoned. This is because applying that decision now has an irrational result, not intended or foreseen[7] when the judgment was written, deriving from subsequent judgments of the court. The irrationality lies in prohibiting a court from making concurrent orders for suspended sentences and probation for different offences while permitting concurrent terms of up to one year's actual imprisonment and probation for different offences.

[43] In *The Tramways Case* (1914) 18 CLR 54 Barton J wrote[8] that the High Court "can always listen to argument as to whether it ought to review a particular decision, and the strongest reason for an overruling is that a decision is manifestly wrong, and its maintenance is injurious to the public interest". That passage by Barton J was cited with apparent approval in the short joint judgment of the High Court in *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (*Thomas' Case*) (1949) 77 CLR 493 at 496, as expressing an appropriate principle justifying reversal of an earlier decision. In *Queensland v The Commonwealth* (1977) 139 CLR 585 Aickin J referred at page 620 to that joint judgment and the passage therein from Barton J in *The Tramways Case*, remarking (at CLR 621) that the expression "manifestly wrong" has many times been used to indicate a basis upon which a prior decision might be overruled, and observing that the expression suggested a subjective criterion not easily applied to distinguish one opinion from another. However, His Honour stated (at CLR 624) that:

> "The expression 'manifestly wrong' is however an accurate and appropriate description for cases which have been overtaken by

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7 *Telstra Corp Ltd v Treloar* (2000) 102 FCR 595 at 603

8 At CLR 69

> subsequent decisions in the same field where a different approach has prevailed."

[44] I suggest that that is the position now applicable to the sentencing practice prohibited in *R v Craig Hughes*. I note that in *Nguyen v Nguyen* (1990) 169 CLR 245 at 269, the joint judgment[9] in the High Court was that where a Court of Appeal held itself free to depart from an earlier decision, it should do so cautiously and only when compelled to the conclusion that the earlier decision was wrong. It held that the occasions upon which departure from previous authority was warranted were infrequent and exceptional, and therefore pose no real threat to the doctrine of precedent and the predictability of the law. The joint judgment cited from *Queensland v The Commonwealth*, and the decision of Aickin J at pp 620 et seq. It appeared thereby to approve Aickin J's acceptance that the expression "manifestly wrong" applied to decisions overtaken by other decisions in the same field where another approach has prevailed. In *Telstra Corp v Treloar* (supra) Branson and Finkelstein JJ cited authority which permitted appellate courts to review earlier decisions where those were "manifestly wrong" or "clearly erroneous", or if "maintenance (of the earlier decision) is contrary to the public interest", referring to examples given by Aickin J in *Queensland v The Commonwealth* at the pages cited in *Nguyen v Nguyen*. Their Honours Branson and Finkelstein JJ went on, referring to decisions on the construction of a statute, to express the view that unless an error in construction was patent, or had produced unintended and perhaps irrational consequences not foreseen by the court that created the precedent, a first decision (or construction) should stand.[10]

[45] That opinion in *Telstra Corp v Treloar* was quoted with approval by the President when giving the decision of this Court in *Sweeney v Volunteer Marine Rescue Currumbin Inc* [2000] QCA 455. That joint judgment in *Telstra Corp v Treloar*, in the passage in it immediately following the opinion cited with approval in *Sweeney v Volunteer Marine Rescue*, reads as follows:

> "In other areas of the law a precedent may be reconsidered if its underlying reasoning is outdated or is inconsistent with other legal developments."

I respectfully observe that that passage in *Telstra Corp v Treloar* is in accord with the reasoning of Aickin J in *Queensland v The Commonwealth*; and the circumstances in which overruling a prior decision has been approved, as expressed in a number of ways in binding and persuasive authorities, justify reconsidering the decision in *R v Craig Hughes*. I would reverse it, and now approve the sentencing practice it then forbade.

[46] That is because the object of s 92(1)(b) of the Act is to benefit an offender and the community by having an offender undergo an often short term of imprisonment as punishment for committing any one offence, followed by a (usually) lengthier period of supervision in the community. Orders of that type for one offence combine actual punishment and personal deterrence with subsequent assistance and some support. The community would also benefit, as described by the President in *R v Arana*, and an individual offender would likewise benefit, from orders imposed for different offences which combine the significant deterrence of a suspended

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9 Of Dawson, Toohey and McHugh JJ

10 At [28] in their joint judgment at 102 FCR 603

sentence with the actual benefit of supervision. Maintaining judicial opposition to the latter combination of sentences appears contrary to the public interest when that opposition relies on an earlier decision which had assumed that concurrent terms of imprisonment and probation could not be ordered for separate offences. To rely on that decision in changed circumstances seems manifestly wrong, in the sense explained by Aickin J. Its underlying reasoning is outdated.

[47] Where the effect of sentencing orders will result in an offender's release on a fixed date, usually the date of sentence, and where that offender can thereafter comply with the terms of the sentencing orders by continued lawful behaviour, there is very little statutory impediment to the orders which can be made and which result in liberty after that ascertained date, albeit subject to conditions such as good behaviour, reporting to nominated authorities, participation in specified activities or undergoing specified treatment. One limitation is provided in s 92(5). This Court has created others by its application of earlier judgments, while effectively reversing the commencing one. I consider the Court should not recognise impediments to sentencing options other than those expressly appearing in the applicable legislation, or resulting either from the manifest impossibility of compliance with the requirements of different orders, or manifest inconsistency of purpose.

[48] There is no inconsistency or difficulty in compliance where an offender is released upon a suspended sentence at the same time as the offender is placed upon probation. There is no prohibition in the Act against both ordering probation (whether immediate or after serving a sentence of up to one year's imprisonment) for one offence, and a (wholly or partially) suspended sentence for another offence. Obviously enough, any orders made should have a consistent effect, such as intended release into the community at the same time under each order. Section 92(1)(b) should be accepted as facultative, that is, its purpose is to allow both imprisonment and probation for one offence; and it says nothing about other orders for other offences. I would hold that suspended sentences of any length can properly be imposed at the same time as sentences of probation for other offences; and that sentences suspended after serving up to 12 months can be imposed concurrently with probation for other offences whether with or without imprisonment on those other offences before release on probation.

[49] The orders discussed during the hearing of this application are capable of concurrent lawful compliance by Mr Hood and would benefit him. In light of the matters raised by the applicant which suggest that the sentencing judge's recommendations may not be acted upon through no fault of Mr Hood, and which have only arisen since he was sentenced, I suggest that other sentences should have been passed, and that the sentences imposed should be varied.[11] I would order that:

- the sentence imposed for burglary on count 1 be varied by deleting the recommendation that Mr Hood be eligible to apply for a post-prison community based release order after serving nine months, and order instead that that sentence be suspended after nine months;

- order that the sentence imposed on count 2 for unlawful assault occasioning bodily harm be set aside and that it be ordered instead pursuant to s 92(1)(b)(ii) that the applicant be sentenced to a term of imprisonment for nine months and

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11 Section 668E(3) of the *Code*

that at the end of that term be released under the supervision of an authorised Corrective Services officer for a period of two years, it being a term of that order that the applicant undergo and complete as directed a cognitive skills program, an anger management program, and a re-offenders' program;

- that the sentences imposed on counts 4, 6, and 7 for unlawful assault and deprivation of liberty be set aside and in lieu thereof sentences of nine months imprisonment be imposed.

[50] **HELMAN J:** I agree with the orders proposed by Jerrard J.A. and with his reasons and those of McPherson J.A.