SUPREME COURT OF QUEENSLAND

CITATION:	*Uittenbosch v Dept of Corrective Services* [2005] QCA 300
PARTIES:	**SHANE ANTHONY UITTENBOSCH** (applicant/respondent) **v** **CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIVE SERVICES** (respondent/appellant)
FILE NO/S:	Appeal No 168 of 2005 SC No 484 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2005
JUDGES:	McPherson JA, Atkinson and Mullins JJ Separate reasons for judgment of each member of the Court McPherson JA and Atkinson J each concurring as to the order made, Mullins J dissenting
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – CONCURRENT, CUMULATIVE AND ADDITIONAL SENTENCES, SENTENCES ON ESCAPE AND COMMENCEMENT OF SENTENCE – DATE OF COMMENCEMENT – where respondent sentenced as a child – where directed pursuant to s 188 *Juvenile Justice Act 1992* (Qld) that respondent be released after serving 50% of the sentence – where respondent transferred to adult prison pursuant to s 211 *Juvenile Justice Act 1992* (Qld) – where respondent committed further offence whilst in prison – where respondent sentenced to further term of imprisonment cumulative on original sentence – whether "period of detention" is to be defined as the period of actual detention served or that imposed by the sentencing judge – whether further term of imprisonment commences from date of release under fixed release order or entire period of detention INTERPRETATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – GIVING

EFFECT TO MANIFEST INTENTION – WHERE INCONSISTENCIES – IN GENERAL – ADMISSABILITY OF EXTRINSIC EVIDENCE IN RELATION TO INSTRUMENTS – where respondent originally sentenced as child and received cumulative term of imprisonment as adult under original sentence – where declaration made as to date from which cumulative sentence would run – where dispute as to correct interpretation of ambiguous statutory provisions in *Juvenile Justice Act* 1992 (Qld) – where ambiguity in legislation construction favouring liberty of the person to be applied – where pursuant to s 14A of *Acts Interpretation Act* 1954 (Qld) interpretation that best achieves purpose of Act to be preferred – where pursuant to s14B of *Acts Interpretation Act* 1954 (Qld) use of extrinsic material in cases of statutory ambiguity allowed

Acts Interpretation Act 1954 (Qld), s 14A s 14B(1), s 14B(2)
Corrective Services Act 1988 (Qld), s 81, s 144(1), s 150, s 151, s 153, s 154, 166(4), 166(5)
Juvenile Justice Act 1992 (Qld), s 2, s 3, s 188(1), s 188(2), s 189, s 190, s 191(1), s 191(2), s 211(1), s 211(2), s 211(3), s 211(4), s 211(5), s 211(6), s 211(7)
Juvenile Justice Act 1992 (Qld), (Reprint No 7) s 227, s 227(2), s 228(1), s 231, s 270, s270(6)
Juvenile Justice Amendment Act 2002 (Qld), s 103, s 230, s 231, s 270(7), s 270(8)
Penalties and Sentences Act 1992 (Qld), s 4, s 156A(1), s 156A(2), s 156(1), s 157(3)

Dietrich v The Queen (1992) 177 CLR 292, cited
Director of Public Prosecutions v Serratore (1995) 38 NSWLR 137, cited
McGarry v The Queen (2001) 207 CLR 121, cited
MIMIA v Al Masri [2003] 126 FCR 54, cited
Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476, cited
R v Powderham [2001] QCA 429; [2002] 2 Qd R 417, cited
R v Prasser; *R v Ainsworth & Ors; ex parte A-G (Qld); R v Bennett* [2003] QCA 468; [2004] 1 Qd R 679, cited
R v Uittenbosch [2004] QSC 439, followed
Smith v Queensland Community Corrections Board [2001] QCA 030; [2002] 1 Qd R 448, distinguished
Watson v Marshall (1971) 124 CLR 621, cited
Williams v The Queen (1986) 161 CLR 278, considered

COUNSEL: J A Logan SC for the appellant
P J Callaghan SC for the respondent

SOLICITORS: C W Lohe, Crown Solicitor for the appellant
Legal Aid Queensland for the respondent

[1] **McPHERSON JA:** The offender, on being transferred from a juvenile detention centre to an adult prison, went on to commit a further offence for which he was

sentenced to a cumulative term of imprisonment. The point at issue is whether, in consequence, he is now liable to serve a total period in prison which is *longer* than the addition of the period he would have spent in juvenile detention and the term he will serve under that cumulative sentence. The question, as can be seen, has produced a difference of opinion among the members of the Court in this case. It is the result of a degree of ambiguity in the relevant statutory provisions.

[2] The offender, who is the respondent to this appeal brought by the Chief Executive of the Corrective Services Department, originally came before Derrington J for sentencing on a charge of murder and other offences. At that time he was still a child. On 6 August 1997 his Honour ordered that he be placed in detention for a period of 12 years. Section 188(1) of the *Juvenile Justice Act 1992*, under which that order was made, required that the offending child must be released from detention after serving 70% of the period of detention, unless it was ordered that the child be released after serving 50% or more (but less than 70%) of that period of detention. This is referred to in s 189 and s 211(6) of the Act as a fixed release order. In the present case, his Honour ordered that the respondent be released after serving six years of the 12 year detention he had imposed.

[3] On 20 June 1998, the respondent, who was then close to his 18th birthday, applied to the Children's Court for, and was granted on 26 June 1998, an order under s 211 of the Act that the unserved period of detention imposed by Derrington J be served as a term of imprisonment in an adult prison. By s 211(4) an order to that effect was under s 211(2) to be taken "for all purposes" to be a sentence of imprisonment for a period equal to the length of the unserved period of detention. "However", as s 211(6) of the same provision added, the child "must be released on parole on the day [on which he] would have been released under a fixed release order", unless he "(b) is required to be held in custody for another reason". I shall refer to this as the exception to s 211(6). In the latest statutory reprint (no 7) of the Act, s 211(6) has been renumbered as s 270(7) and (8); but I will continue to refer to them by their former section numbers.

[4] Under the order made by Derrington J in 1997, the respondent was due for fixed release on 15 June 2003, which was, it seems, six years from the date of the order made on 6 August 1997. However, on 29 May 2003 he was sentenced by Holmes J in the Supreme Court to a term of imprisonment for three years cumulative upon his current sentence, as it now is, under the original order of Derrington J. Her Honour also made a recommendation under the three year sentence she imposed for parole after the respondent had served 12 months, although that feature of the sentence does not impinge on the question of interpretation now being considered.

[5] No one doubts that the term of imprisonment imposed by Holmes J was cumulative. The question is to decide on what it was, or is to be, cumulative. Is it the end of the period of detention of six years imposed in August 1997, at which the respondent "must be released on parole" on 15 June 2003? Or is it to be only after the whole of the 12 years of detention imposed in 1997, regardless of that fixed release date? If the latter, the date on which the cumulative three year term of imprisonment will begin will, it seems, be 15 June 2009 rather than 15 June 2003.

[6] The result is that by transforming the period of juvenile detention into an equivalent term of imprisonment, and by committing a further offence during that

term, the respondent has effectively incurred the addition of a further six years to his time in prison. I say "and by committing a further offence" because the strength of the appellant's submission lies in the words of the exception to s 211(6). It says that the offender is to be released on parole on the date at which he would have been released under the original fixed release order "unless" [he] "(b) is required to be held in custody for another reason". So, instead of gaining his freedom after serving a further three years, he must now serve a further nine years before becoming entitled to do so. For this purpose I am excluding consideration of the parole recommendation, which may or may not be given effect.

[7] I find it difficult to credit the legislature with having intended such a result. The ordinary interpretative presumption applied to legislation restricting the liberty of the subject is against such a conclusion. A recent example of its application to sentencing legislation of this kind is seen in *R v Powderham* [2002] 2 Qd R 417, 422. Of course, the legislature may provide for such a result if it wishes; but, to do so, it must speak clearly and unambiguously. It is said here that it has done so in two particulars. The first is by force of the exception at the end of s 211(6) "unless [he] (b) is required to be held in custody for another reason". But that exception in s 211(6)(b) is sufficiently accounted for in this case by reason of the imposition of the further cumulative sentence of three years imposed by Holmes J on 29 May 2003. It is "another reason" for requiring him to be held in custody after the end of the first six years. There is no compelling justification for treating that exception to s 211(6) as adopting as "another reason" the outstanding further six years of juvenile detention imposed on 6 August 1997.

[8] The second particular that is said to displace the presumption is that the prima facie meaning of the expression "term of imprisonment" is the duration of the period in prison imposed by the sentencing judge: cf *Smith v Queensland Community Corrections Board* [2002] 1 Qd R 448, 449. But contrary to the submission of Mr Logan SC, I do not consider that this meaning can simply be transferred and applied to the expression "period of detention" in the expression "unserved part of the period of detention" in s 211 of the *Juvenile Justice Act*. To my mind, in speaking of a period of detention, the reference is primarily to the period during which a person is in fact detained or in custody. By contrast, "term of imprisonment", has long since passed into law and literature as the duration of the sentence imposed, whether all of it was served in detention or not. Many of those transported to Australia 200 years ago had been sentenced to imprisonment, as Marcus Clarke expressed it in the title to his novel, "for the term of his natural life". After being brought here, many of them were granted "tickets of leave" without anyone supposing that the "term" or duration of their sentences had been truncated or reduced. On the other hand, the period of their detention in custody by virtue of tickets of leave was very much less than the term of imprisonment to which they had been sentenced.

[9] It is possible that the draftsman of the statutory provisions under consideration here did not employ those expressions in the sense suggested by this usage. But, until it is clear that that was not intended, and what new sense is intended, I consider that we should adhere to their hitherto accepted meanings. If that course is followed, it may be that some degree of uniformity will be preserved in the meanings that are attributed to them in the legislation. It is true that s 190, now renumbered as s 230, provides that, for the purpose of calculating the end of the child's period of detention, the period of time for which a child is released from detention under a

fixed release order is to be counted as part of the period that the child spent in detention. But the function of this provision is, I consider, simply to deflect the contrary philosophy in other statutory provisions, such as those contained in s 151 of the *Corrective Services Act 2000*. In my view, s 190 does not bear upon the question now being considered.

[10] It follows that I agree with the reasons of Holmes J in *R v Uittenbosch* [2004] QSC 439, and with the orders foreshadowed by Atkinson J in this appeal.

[11] **ATKINSON J**: The determination of this appeal depends upon the correct interpretation of legislation as it applies to the detention of a person who was originally sentenced as a child under the *Juvenile Justice Act* 1992 (JJA) and who has received, as an adult still under the original sentence, a cumulative term of imprisonment. The appeal is brought by the Chief Executive, Department of Corrective Services, from a declaration made on 10 December 2004 that the sentence of three years' imprisonment which the learned sentencing judge imposed on Mr Uittenbosch on 29 May 2003 began on 15 June 2003. Before examining in detail the rather confusing and ambiguous statutory provisions which determine this matter, it is useful to refer to the principles of statutory construction which are relevant.

Liberty of the Person

[12] The first interpretative principle is that an ambiguity in legislation affecting the liberty of the person will usually be construed in favour of the person affected.[1]

[13] The right to personal liberty is the most basic and fundamental of the human rights recognised by the common law. This fundamental right was referred to by Mason and Brennan JJ (as their Honours then were) in their joint judgment in *Williams v The Queen*[2] as follows:

> "The right to personal liberty is, as Fullagar J described it, 'the most elementary and important of all common law rights': *Trobridge v Hardy* (1955) 94 CLR 147 at 152. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England 'without sufficient cause': *Commentaries on the Laws of England* (Oxford, 1765), Bk 1, pp 120-121, 130-131. He warned:
>
> > 'Of great importance to the public is the preservation of this personal liberty'
>
> The right to personal liberty cannot be impaired or taken away without lawful authority and then only *to the extent and for the time* which the law prescribes." (emphasis added)

[14] The fundamental importance which the common law attaches to personal liberty was discussed in some detail by the Full Court of the Federal Court of Australia in

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1 This is based on the broader principle of the common law referred to by Lord Hoffmann in *R v Secretary of State for Home Department; Ex parte Simms* [2002] 2 AC 115 at 131 as 'the principle of legality'; see also Spigelman CJ "Statutory Interpretation and Human Rights" http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_260705.

2 (1986) 161 CLR 278 at 292.

MIMIA v Al Masri.[3] As their Honours pointed out, even minor deprivations of liberty are viewed seriously by the common law.[4] Their Honours referred to the decision of Walsh J in *Watson v Marshall*[5] where his Honour observed that: "any interference with personal liberty even for a short period is not a trivial wrong".

[15] The fundamental nature of this right is reflected in the rule of statutory construction to prefer a strict construction which favours liberty. As Kirby P (as his Honour then was) said in *Director of Public Prosecutions v Serratore*[6]:

> "Traditionally, in our law, liberty has been regarded as a most precious civic right. Legislation which has the effect of derogating from the right of an individual to enjoy liberty is conventionally accorded (in the case of ambiguity) a strict construction which favours liberty: *Piper v Corrective Services Commission of New South Wales* (1986) 6 NSWLR 352 at 358".[7]

[16] In *Smith v Corrective Services Commission of New South Wales*[8] the High Court considered legislation which dealt with the circumstances in which a prisoner who had been released on parole and whose parole was revoked, meaning that the prisoner was returned to prison to serve the balance of his sentence, might lose an entitlement to remission. In a joint decision of Stephen, Mason, Murphy, Aicken and Wilson JJ, the court examined the statutory regime which applied to revocation of remissions, dealing first with a prisoner who had escaped:

> "It is made quite clear that such a prisoner forfeits his entitlement to any remission under regs 110 and 111 in respect of the period of imprisonment served before the escape. Not only in the case of escape, but also in relation to other grounds of forfeiture of remission the regulations appear to be quite specific.
>
> Of course, these observations do not of themselves establish the applicant's case, but they indicate something of the context in which reg 110 is found, and lead to an expectation that if, in the event of a revocation of parole, a prisoner cannot claim an entitlement to the remission prescribed by that regulation in respect of the period of his sentence that had served before being released on parole *then the law in question will point clearly and unmistakably to that conclusion. It will not be found by implication that results from the interpretation of an obscure or ambiguous provision. The expectation to which we refer is reinforced by the established principle of statutory interpretation requiring strict construction of a penal statute, or an Act which affects the personal liberty of the subject: Maxwell on Interpretation of Statutes*, 12th ed (1969), p 239; *Marcotte v Deputy*

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3 [2003] 126 FCR 54 at [86]-[95]

4 At [88]. *See also Potter v Minahan (1908) 7 CLR 277 at 304; Al-Kateb v Godwin (2004) 208 ALR 124 at [19];*

5 (1971) 124 CLR 621 at 632

6 (1995) 38 NSWLR 137 at 142

7 See also *Coco v The Queen* (1994) 179 CLR 427 at 437-438 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Re Bolton; Ex-parte Beane* (1987) 162 CLR 514 at 523; *R v Cannon Rowe Police Station (Inspector)* (1922) 91 LJKB 98 at 106; *MIMIA v VFAD of 2002* [2002] FCAFC 390 (9 December 2002) at [108]-[111].

8 (1980) 147 CLR 134 at 139.

> *Attorney General (Canada)*;[9] *Board of Fire Commissioners (NSW) v Ardouin*;[10] *Watson v Marshall and Cade*.[11]" (emphasis added)

[17] The statutory construction of the presumption against the curtailment of fundamental freedoms has been most recently set out by Gleeson CJ in the High Court in *Plaintiff S157/2002 v Commonwealth*[12] where his Honour said:

> "… courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment: *Coco v R*.[13]"

[18] The common law presumption in favour of the liberty of the individual means that it can only be removed or curtailed by, and to the extent of, specific statutory provision to that effect: see *McGarry v The Queen*.[14]

Purposive Interpretation

[19] The second interpretative principle is articulated in s 14A of the *Acts Interpretation Act* 1954 (AIA) which provides that the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

[20] Amongst the objectives of the JJA, found in s 2 of that Act, is the objective to ensure that courts deal with children who have committed offences according to principles established under the JJA. Those principles are the Juvenile Justice principles referred to in s 3 of the JJA and set out in schedule 1. The relevant principles to the determination of this case include principles 2, 16 and 17, which provide:

> "2 The youth justice system should uphold the rights of children, keep them safe and promote their physical and mental well being.
>
> …
>
> 16 A child should be dealt with under this Act in a way that allows the child to be reintegrated into the community.
>
> 17 A child should be detained in custody for an offence, whether on arrest or sentence, only as a last resort and for the least time that is justified in the circumstances."

Use of Extrinsic Material

[21] The third relevant principle of statutory interpretation is that in the case of ambiguity or obscurity, resort may be had to extrinsic material: see s 14B of the

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9 (1974) 51 DLR (3d) 259 at 264.
10 (1961) 109 CLR 105 at 116.
11 (1971) 124 CLR 621 at 629, 649.
12 [2003] HCA 2 (4 February 2003) at [30].
13 (1994) 179 CLR 427 at 437.
14 (2001) 207 CLR 121 at 141-142.

AIA. Such extrinsic material may include any explanatory memorandum and any treaty or international agreement mentioned in the Act in question.

[22] The Convention of the Rights of the Child was adopted by the United Nations on 2 September 1990. Australia signed the Convention on 22 August 1990 and it entered into force in Australia on 16 January 1991. While the Convention is not specifically mentioned in the JJA, it can be seen that many of its provisions underlie the principles and provisions of the JJA. For example article 37(b) is similar to principle 17 in JJA and provides that:

> "The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

Article 40(1), which is in part replicated in principles 2 and 16, provides:

> "1. States Parties recognise the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

Such international instruments have, as Brennan J (as his Honour then was) observed in *Dietrich v The Queen*,[15] a legitimate influence on the development of the common law.[16]

Interpretation

[23] It is in accordance with these rules of statutory construction that the court should approach statutes which deal with the incarceration of juvenile offenders. Any lack of clarity in the legislation should, as a matter of principle, be resolved in favour of imprisonment for the least time consistent with the statutory language.

History of the Present Matter

[24] It is necessary to commence with the sentence imposed upon the respondent when he was a child. The section numbering of the JJA has changed. To avoid confusion, I shall refer to the sections according to their present numbers. On 20 June 1997, Mr Uittenbosch was found guilty on counts of murder, house breaking, armed robbery in company and assault occasioning bodily harm in company whilst armed. He was sentenced on 6 August 1997 to detention: on count 1 for a period of twelve years; on counts 2 and 3 for five years; and on count 4 for three years. All sentences were ordered to be served concurrently and it was declared that forty-nine days spent in pre-sentence custody between 26 and 27 July 1996 and 20 June to 6 August 1997 be taken into account as time already served under the sentence.

[25] An additional order was made pursuant to s 227(2) of the JJA with respect to count 1 ordering that Mr Uittenbosch be released from detention after serving 50 per cent of the period of detention. Section 228(1) of the JJA provided that at the end of the

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15 (1992) 177 CLR 292 at 321.

16 See also *R v Swaffield* (1998) 192 CLR 159 at 213 per Kirby J.

period after which the child was required to be released under s 227, the Chief Executive must make an order releasing the child from detention. Such an order is called a "supervised release order" and is entirely different from a post-prison community based release order under the *Corrective Services Act* 2000 (CSA) in that there is no discretion whether or not to grant a supervised release order under JJA: the child must be released from detention. The supervised release order can only be cancelled once the child has been released and then only with strict safeguards: JJA s 231.

[26] The respondent made an application for transfer to an adult prison. He was born on 15 July 1980 so was just one month short of his eighteenth birthday when McGuire DCJ, who was then President of the Children's Court, granted his application on 26 July 1998 under s 270 of the JJA. At the time the order was made, s 270 of the JJA provided:

"**Childrens Court may order transfer to prison**

270.(1) Subject to subsection (2), a person serving a period of detention under a detention order, or the commission, may apply to a Childrens Court Judge for an order that the unserved part of the period of detention be served as a term of imprisonment.

(2) Subsection (1) only applies if –
- (a) the person is 18 or more; or
- (b) the person is 17 or more and –
  - (i) has previously been held in custody in a prison on sentence, remand or otherwise; or
  - (ii) has been sentenced to serve a term of imprisonment.

(3) The Court may grant or refuse to grant the order.

(4) An order made under subsection (1) –
- (a) must specify the day on which the order will take effect; and
- (b) is taken for all purposes to be a sentence of imprisonment for a period equal to the length of the unserved part of the period of detention.

(5) The *Corrective Services Act* 1988 applies to a person imprisoned under the order.

(6) However, the person may only, and must, be released on parole on the day the person would have been released under a fixed release order if the order under subsection (1) had not been made, unless the person –
- (a) is released under the *Corrective Services Act* 1988, section 166(4) or (5);[17] or
- (b) is required to be held in custody for another reason.

(7) In this section –

"period of detention", for a person who is liable to serve a further period of detention cumulatively with a period of detention being served, includes the further period of detention."

[27] The significant sub-section for the purposes of this matter is sub-section (6). While the person becomes regulated by the CSA, that is subject to retaining the release date he or she had under the detention order imposed under the JJA, with limited specified exceptions. Section 166(4) and (5) of the CSA concern earlier release on

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17 *Corrective Services Act* 1988, section 166(4) or (5) (Eligibility for parole).

parole because of special circumstances and are not relevant to this case. It follows that Mr Uittenbosch must be released on the day he would have been released under the fixed release order on 15 June 2003, ie after serving 50 per cent of the period of detention to which he was sentenced on 6 August 1997, unless he was required to be held in custody for another reason.

[28] While he was in custody, Mr Uittenbosch (along with a number of other prisoners) committed the offence of assault occasioning bodily harm. He pleaded guilty and was sentenced on 29 May 2003. The learned sentencing judge imposed three years' imprisonment to be served cumulatively. That sentence took into account as to its length, the respondent's youth and guilty plea. It was imposed cumulatively because of the requirements of s 156A(1)(b)(i) of the *Penalties and Sentences Act* 1992 (PSA). Section 156A(2) of the PSA provides:

> "A sentence of imprisonment imposed for the offence must be ordered to be served cumulatively with any other term of imprisonment the offender is liable to serve."

[29] The sentencing judge then dealt with the question of his eligibility for post-prison community based release in accordance with the requirements of s 157(3)(a) of the PSA. With regard to Mr Uittenbosch, her Honour said:

> "In your case I intend to make an exception from the pattern of recommendations halfway through the sentence imposed in order to recognise the pressing need for furtherance of your rehabilitation, which seems to be well under way, by recommending, for what it is worth, that you be eligible for parole 12 months from your otherwise eligibility date, that is, as of 15 June 2004."

[30] Her Honour's remarks show that she was perhaps somewhat sceptical that her recommendation for early release on parole would be acted upon. That scepticism appeared to have been warranted. Her recommendation has not been acted upon even though it is more than a year after it was due to take effect.

[31] The cumulative period of imprisonment imposed on 29 May 2003 was "another reason" that Mr Uittenbosch was required to be held in custody under s 270(6) so he was not released on the date on which his supervised release order was due to take effect.

[32] The question remains as to when the sentence of three years' imprisonment imposed by the learned sentencing judge commences. The answer to that question depends on whether Mr Uittenbosch entirely lost the benefit of the supervised release order made pursuant to s 227(2) of the JJA. Given the canons of statutory construction referred to earlier in these reasons, he could only lose all of the benefit of the order made under the JJA which was preserved when he transferred to an adult prison if it was clearly and unequivocally taken away.

[33] As a prisoner with a mandatory release date he was quite unlike a prisoner who might or might not be released on parole and whose only mandatory release date is the end date of his or her sentence, less any remissions, no matter what release date is recommended. In the latter case, the cumulative period of imprisonment commences on the end date of his or her first sentence, taking into account any remissions: CSA s 81. The commencement date of a cumulative sentence of a prisoner in Mr Uittenbosch's situation was by no means so obvious. If his

cumulative sentence were to commence at the end of the 12 years then the benefit of his supervised release order would be entirely lost. It would be lost by implication rather than because it was explicitly taken away.

[34] The statutory history shows that it was not the legislative intention. Section 270 was amended twice, once before and once after the order was made transferring Mr Uittenbosch to an adult prison. The relevant amendment is the amendment made in 1996, before McGuire DCJ made his order. In 1996, the section was amended by the *Juvenile Justice Legislation Amendment Act*, No 22 of 1996. The term that had been in sub-section (1), "remainder of the period of detention", was replaced by the term "unserved part of the period of detention". It was said in the Explanatory Notes that this was "so as to leave no doubt that what is being transferred is the balance of the period left to be spent *in custody*." (emphasis added) In addition, the present sub-section (6) was added, as the Explanatory Notes explain, to clarify the law relating to parole or early release in such circumstances. "The intention is to carry out the original intention of the sentencing court as to the length of *actual detention*, despite the physical transfer to a prison." (emphasis added). Both the expressions "in custody" and "actual detention" refer to the part of the sentence imposed on the child which must be spent in actual custody ie not on supervised release. It was designed to specifically preserve the dual nature of the sentence imposed which was for six years in detention and six years supervised release. That was not lost by a later imposition of a cumulative period of imprisonment. The actual period in custody under that sentence must commence at the end of the actual period of custody under the previous sentence unless there is specific legislation taking away or denying the prisoner that right to liberty.

[35] There are said in s 270(6) of the JJA to be only two exceptions. There are no others. The first is s 270(6)(a), which is irrelevant. The second is "that the prisoner is required to be held in custody *for another reason*." (emphasis added). The words "for another reason" amply demonstrate that he or she can not be further held in custody under the first sentence. It is not *another* reason. The period of custody under the first sentence must end at the end of six years. The second sentence is in this case the reason why he is kept in custody. That means that the period of custody under the second sentence must have commenced when the period of custody under the first sentence ended ie 15 June 2003 otherwise there would have been no authority to keep him in custody. He could not be kept in custody under the first sentence after 15 June 2003. His supervised release order will come into effect as soon as the second sentence has been served.

[36] The appellant argues that s 81 of the CSA applies to this case. That section provides:

> "**Effect of remission on cumulative sentences**
> If a prisoner is ordered to serve a term of imprisonment (the **"second term"**) cumulatively with another term of imprisonment (the **"first term"**), the second term starts at the end of the first term, taking into account any remission granted in relation to the first term."

This section cannot be read alone; but must be read in the light of s 270 of the JJA, particularly (6) which applies notwithstanding the CSA. It does not explicitly remove the right of the child to release after serving half of his sentence. When s 81 of the CSA is read subject to s 270(6) of the JJA, the end of the first term in s 81 must refer, in the case of juvenile offenders who have been transferred to an adult

prison, to the end of the period of actual custody to be served under the first sentence. If it does not then it would either have the absurd result that Mr Uittenbosch would be released pursuant to his fixed release order and six years later would be returned to prison to commence his sentence of three years' imprisonment; or the unduly harsh result that he would be required to serve an additional six years' imprisonment under the first sentence before commencing the second sentence. Neither of those outcomes is consistent with the plain words or the legislative intent of s 270 of the JJA which is the section which determines the effect of the second sentence imposed in these circumstances.

[37] The appeal should be dismissed with costs.

[38] **MULLINS J:** The Chief Executive, Department of Corrective Services ("the appellant") appeals against the declaration made by Holmes J on 10 December 2004 that the sentence of three years' imprisonment imposed by her Honour on Shane Anthony Uittenbosch ("the respondent") on 29 May 2003 began on 15 June 2003.

History of proceedings against the respondent

[39] The respondent was sentenced by Derrington J on 6 August 1997 as a child for the offence of murder and other offences, after pleading guilty. In respect of the offence of murder, the defendant was placed in detention for a period of 12 years and it was directed that he be released after he had served 50% of the sentence. A declaration was made in respect of 49 days spent in pre-sentence custody. The sentences of detention in respect of the other offences were ordered to be served concurrently and were each less than six years.

[40] At the time those sentences were imposed, s 188 of the *Juvenile Justice Act* 1992 ("*JJA*") (as found in Reprint No 4) provided for the release of a child after a fixed period of detention. Unless the court made an order under s 188(2) of the *JJA*, s 188(1) of the *JJA* required that a child sentenced to serve a period of detention must be released from detention after serving 70% of the period of detention. Under s 188(2) of the *JJA* the court could order that a child be released from detention after serving 50% or more, and less than 70%, of a period of detention if the court considered that there were special circumstances. Under s 189 of the *JJA* the Chief Executive was required, at the end of the period after which a child was required to be released under s 188, to make an order called a fixed release order releasing the child from detention on such conditions as the Chief Executive considered appropriate. Section 190 of the *JJA* provided that:

> "**190.** A period of time for which a child is released from detention under a fixed release order must be counted as part of the period that the child spent in detention for the purpose of calculating the end of the child's period of detention."

Under s 191(1) of the *JJA* the Chief Executive was given power to revoke a fixed release order where the Chief Executive was of the opinion, on reasonable grounds, that the child released from detention under the fixed release order had contravened a condition of the order. That could then result in the issue of a warrant for the arrest of the child, so that the child could be returned to a detention centre for the unexpired portion of the child's sentence: s 191(2) *JJA*.

[41] The respondent had the benefit of an order pursuant to s 188(2) of the *JJA* which meant that he would be the subject of a fixed release order after six years of the period of detention had been served.

[42] On 20 June 1998 an application was made under s 211(1) of the *JJA* (as found in Reprint No 5) for an order which enabled the respondent's transfer to an adult prison. Section 211 was at that time in the following terms:

> "**Childrens Court may order transfer to prison**
>
> **211.(1)** Subject to subsection (2), a person serving a period of detention under a detention order, or the commission, may apply to a Childrens Court judge for an order that the unserved part of the period of detention be served as a term of imprisonment.
>
> **(2)** Subsection (1) only applies if—
>
> (a) the person is 18 or more; or
>
> (b) the person is 17 or more and—
>
> (i) has previously been held in custody in a prison on sentence, remand or otherwise; or
>
> (ii) has been sentenced to serve a term of imprisonment.
>
> **(3)** The court may grant or refuse to grant the order.
>
> **(4)** An order made under subsection (1)—
>
> (a) must specify the day on which the order will take effect; and
>
> (b) is taken for all purposes to be a sentence of imprisonment for a period equal to the length of the unserved part of the period of detention.
>
> **(5)** The *Corrective Services Act 1988* applies to a person imprisoned under the order.
>
> **(6)** However, the person may only, and must, be released on parole on the day the person would have been released under a fixed release order if the order under subsection (1) had not been made, unless the person—
>
> (a) is released under the *Corrective Services Act 1988*, section 166(4) or (5); or
>
> (b) is required to be held in custody for another reason.
>
> **(7)** In this section—
>
> **"period of detention"**, for a person who is liable to serve a further period of detention cumulatively with a period of detention being served, includes the further period of detention."

[43] On 26 June 1998 the President of the Children's Court, McGuire DCJ, ordered in the following terms:

> "Pursuant to S.211 of the Juvenile Justice Act, it is ordered that the unserved period of detention of 12 years imposed on the 6th August, 1997 in the Supreme Court be forthwith served as a period of imprisonment."

[44] When this order was made, the date on which the respondent was due for release by applying ss 188(2), 198(1) and 211(6) of the *JJA* was therefore 15 June 2003.

[45] Whilst a prisoner the respondent was involved in the assault of another prisoner and pleaded guilty on 16 May 2003 to assault occasioning bodily harm with circumstances of aggravation. On 29 May 2003 the respondent was sentenced by

Holmes J to serve a period of three years' imprisonment cumulative on his current sentence with a recommendation that he be considered eligible for post-prison community based release on 15 June 2004. In her Honour's sentencing remarks reference was made to the respondent's full time discharge date for his sentence of detention that had been converted into imprisonment as 17 June 2009 and to the date that he would have been eligible to be released on parole pursuant to the direction made at the time he was sentenced for the offence of murder as 15 June 2003. Although her Honour imposed a head sentence for this offence of three years' imprisonment cumulative on the respondent's existing sentence, her Honour expressly recognised the need to facilitate the respondent's rehabilitation by recommending eligibility for parole 12 months later than what would have been the respondent's eligibility date, had he not committed this offence of assault.

[46] The Attorney-General appealed against the sentence imposed on the respondent and his co-accused and that appeal was dismissed: *R v Prasser; R v Ainsworth & Ors; ex parte A-G (Qld); R v Bennett* [2003] QCA 468.

[47] By November 2004 the respondent had not been released on parole and the respondent filed an application seeking a declaration that the sentence of three years' imprisonment imposed on him on 29 May 2003 commenced from 15 June 2003. That application was treated as seeking a reopening of the sentence under s 188 of the *Penalties and Sentences Act* 1992 ("*PSA*"). Holmes J made the declaration sought by the respondent for the reasons that were published on 10 December 2004: *R v Uittenbosch* [2004] QSC 439 ("the reasons for judgment").

Reasons for making the declaration

[48] Counsel for the respondent had argued before Holmes J that, although a term of imprisonment ordered to be served cumulatively would ordinarily commence from the end of the first term of imprisonment, because of the existing direction that the respondent be released after serving 50% of the period of detention, the respondent was liable to serve no more than that part of the sentence and the cumulative sentence imposed by her Honour should have commenced as at 15 June 2003.

[49] Counsel for the appellant relied on s 81 of the *Corrective Services Act* 2000 ("*CSA*") which provides:

> "**Effect of remission on cumulative sentences**
> If a prisoner is ordered to serve a term of imprisonment (the ***second term***) cumulatively with another term of imprisonment (the ***first term***), the second term starts at the end of the first term, taking into account any remission granted in relation to the first term."

The appellant's counsel argued before Holmes J that the first term of imprisonment referred to in s 81 of the *CSA* was the balance of the term of the period of detention of 10 years and 357 days remaining to be served from 26 June 1998 and the second term of imprisonment was that imposed by her Honour and would not begin until the end of that first term on 18 June 2009, or earlier, if remissions applied. The submission was made that the "unserved part of the period of detention" referred to in ss 211(1) and (4) of the *JJA* meant the balance of the entire period of detention remaining to be served at the date of the order under s 211(1) of the *JJA* and not the part remaining to be served in custody up to the fixed release order date and that, if

that were not so, s 211(6) of the *JJA* which enabled release on parole on the fixed release order date would be otiose.

[50] In order to determine the meaning of “unserved part of the period of detention”, her Honour considered the history of s 211 of the *JJA* and the various explanatory notes which accompanied each substantial change to the provision. Subsection (6) of s 211 of the *JJA* was introduced by the *Juvenile Justice Legislation Amendment Act* 1996. The explanatory note for that amendment which was described by her Honour in paragraph [15] of the reasons for judgment as “illuminating” stated:

> “Section 211 of the Act is amended as to allow the Commission to apply to the court for an order that the balance of a child detention order be served as a term of imprisonment.
>
> Amendments are also made to clarify the operation of the section.
>
> The term "remainder of the period of detention" is replaced with the term "unserved part of the period of detention", so as to leave no doubt that what is being transferred is the *balance of the period left to be spent in custody*.
>
> At the same time, the opportunity is taken of clarifying the law relating to parole or early release in such circumstances. Under the amended section, the child must be released (but under parole conditions) on the date when the child would have been released had the detention order been served out in a child detention centre (that is, subject to the 50% or 70% fixed release date). The intention is to carry out the original intention of the sentencing court as to the length of actual detention, despite the physical transfer to a prison.
>
> There are two exceptions, namely, earlier release on parole where special circumstances exist and where there is some other reason for the person remaining in custody (for instance, another sentence).” (italics added)

[51] Her Honour made an additional observation at paragraph [15] of the reasons for judgment in respect of the language of this explanatory note:

> “The equation of the term ‘unserved part of the period of detention’ with ‘the balance of the period left to be spent in custody’ seems to make it quite clear that what is meant is the period before the child’s release on the fixed release order. That is reinforced by the expressed intent of ‘carry[ing] out the original intention of the sentencing court as to the length of actual detention’.”

[52] By s 103 of the *Juvenile Justice Amendment Act* 2002 which commenced on 1 July 2003, s 211(6) of the *JJA* was amended and a new s 211(6A) was inserted. With the renumbering that was also effected by that Act, those provisions became ss 270(7) and (8) of the *JJA* and now provide:

> “(7) However, the person may only, and must, be released on parole on the day the person would have been released under a supervised release order if the order under subsection (1) had not been made.
>
> (8) Subsection (7) does not prevent–

…

(b) the continued custody of the person for the unserved part of any sentence of imprisonment imposed against the person."

[53] Her Honour set out at paragraph [16] of the reasons for judgment the relevant part of the explanatory note in respect of that amendment:

"clarifies that while a child who has been transferred to a corrective services facility must be released on the child's supervised release date, this mandate does not negate the possibility of earlier release under an 'exceptional circumstances parole order' under the *Corrective Services Act 2000* or the continued custody of the person if they are required to continue to serve a period of imprisonment."

[54] The reasoning of her Honour that resulted in making the declaration that is the subject of this appeal is set out in paragraphs [17] to [19] of the reasons for judgment:

"[17] The terms of both subsection 211(6) of the Act as it stood at the relevant time, and subsection 270(8) as it now appears, tend to reinforce the view that, from the fixed release order date, the prisoner is no longer to be regarded as being held in custody on the juvenile sentence. Section 211(6) does not suggest that the juvenile sentence is a continuing reason for holding the prisoner, but rather that the reason for custody at that point is the existence of an independent custodial requirement; as the explanatory notes at the time it was introduced suggest, a new sentence. If anything, the combined effect of subsections 270(7) and 270(8) make the position even clearer: the prisoner is to be released in respect of the juvenile sentence, but that requirement will not prevent his continued custody for another sentence. There is no suggestion in either provision that he may be held in contemplation of an adult sentence to commence at sometime in the future, at the end of the juvenile period of detention.

[18] There is nothing in either s 211 or s 270 which suggests an intention that the advantage the Act confers on a juvenile offender, of a fixed end date to his time in custody, is to be lost as a consequence of offending, no matter how minor, in the adult jail context. Sub-sections 211(6) and 270(8) do no more than provide in a common sense way that a fixed release date does not entitle an offender, who still has an adult sentence to serve, to his liberty. Section 81 of the *Corrective Services Act* applies in such cases in this way: the first term of imprisonment runs up until the fixed release order date, and the second, cumulative term from that date.

[19] That construction does not, I think, conflict with the parole regime under the *Corrective Services Act*. Under s 153 the prisoner is taken, while on parole to be still serving the sentence imposed; so far as a juvenile offender is concerned,

> that will be the sentence for the entire period of detention. Notwithstanding that only that part of the period of detention up to the fixed release date is to be served as a term of imprisonment under s 211, the offender remains under sentence once that date has passed, just as he would if he were a juvenile released from a detention centre. Thus, where if he breached a supervised release order as a juvenile he could expect under s 231 of the *Juvenile Justice Act* to be returned to a detention centre to serve the unexpired part of his sentence, a contravention of the parole order can result in his being required, under s 150 of the *Corrective Services Act,* to serve the unexpired part of the sentence in a jail."

Submissions of the appellant

[55] The appellant contends for an analogous approach to that taken in *Smith v Queensland Community Corrections Board* [2002] 1 Qd R 448 where it was observed by McPherson JA at 449 that the natural *prima facie* meaning of the word "term of imprisonment" was the term of imprisonment imposed by the sentencing judge and not the duration of the period for which the prisoner is, in fact, detained. Mr Logan of Senior Counsel who appeared for the appellant submitted that there is nothing in the *JJA* to contradict the natural meaning of the words "period of detention" in s 211 of the *JJA* which was the period of detention imposed on the child by the sentencing judge.

[56] Although Holmes J in paragraph [19] of the reasons for judgment contemplated that the effect of the declaration that her Honour made would not interfere with the release of the respondent on parole for whatever remained at the time of his release of the term of the period of detention as originally imposed on him when sentenced as a child by the sentencing judge, the appellant made the following submission:

> "Her Honour's construction of s. 211 in effect rewards a juvenile offender such as the respondent who later offends in circumstances mandating cumulative imprisonment by treating his earlier deemed term of imprisonment as concluding on his fixed release date. In this case, that, if correct, has the result that an offender originally potentially liable to custodial detention and at least the control of a release order until 2009 is instead under a similar liability only until 2006 – 3 years from 15 June 2003 – even though he has committed a further serious offence in the meantime."

[57] It was submitted that the statement in the explanatory note to the 1996 amendment of s 211 that "what is being transferred is the balance of the period left to be spent in custody" is incorrect and inconsistent with the later, correct statement in that same note that "The intention is to carry out the original intention of the sentencing court as to the length of actual detention, despite the physical transfer to a prison.".

[58] Because it was suggested by the appellant that the 2002 amendment did not materially modify s 211(6) of the *JJA*, it was also submitted that neither that amendment nor its explanatory note offered any assistance as to when a cumulative term of imprisonment imposed on a former juvenile offender who was the subject of a s 211 transfer order commenced.

[59] The submission was also made that the intention of Parliament concerning the effect of the transfer of a juvenile offender to a prison pursuant to s 211 of the *JJA* was clear enough on the face of the provision, so that resort to the explanatory note was unnecessary and apt to confuse.

[60] It was therefore submitted that "another reason" provided for in s 211(6)(b) of the *JJA* was the imposition in the case of the respondent of the cumulative term of 3 years' imprisonment and that it did not, by virtue of s 81 of the *CSA*, commence until 18 June 2009. The appellant pointed to the making of the recommendation for post-prison community based release which her Honour was required to do under s 157(3) of the *PSA*, as providing a way of alleviating any perceived arbitrary or extreme outcome from the application of s 156A of the *PSA*.

Submissions of the respondent

[61] Mr Callaghan of Senior Counsel who appeared for the respondent based his submissions on the benefit that was conferred on the respondent by s 211(6) of the *JJA* when the transfer order was made. It was submitted that the respondent became an adult prisoner who had the entitlement of certainty of release at a fixed point in time and who therefore did not have to submit to the discretionary regime applicable to the obtaining of parole under the *CSA*.

[62] It was submitted that the respondent could not lose this entitlement, because of s 81 of the *CSA*. It was submitted that the purpose of s 81 of the *CSA* was to clarify the effect of remissions and it was not intended to remove the benefit conferred by s 211(6) of the *JJA*.

[63] If it were considered that the phrase "period of detention" was ambiguous in s 211(1) of the *JJA*, the respondent adopted the approach taken by Holmes J of looking at the explanatory note and submitted that it was the period of actual detention that was transferred and which became relevant for the purpose of cumulative sentences.

Relevant considerations under s 211 *JJA*

[64] Before endeavouring to construe s 211 of the *JJA*, it assists to consider what factors the provision is endeavouring to accommodate.

[65] The first factor is the recognition of the effect of the fixed release order. Section 211 of the *JJA* applies to a child who has been sentenced to a period of detention and recognises that under the *JJA* that means the child must be the subject of a fixed release order after the child has served 70% of the period of detention or that period that was ordered to be served pursuant to s 188(2) of the JJA at the time the sentence was imposed.

[66] Another factor is the need to address the requirements of an offender who is approaching or has reached adulthood. Where the offender is aged 17 years or more and a person to whom s 211(2) of the *JJA* applies, that person can be the subject of a transfer order to an adult prison pursuant to s 211(1) of the *JJA*. The explanatory note for the original s 211 of the *JJA* did not give the reason for enacting this provision. It is a fair inference that transfer of an offender at that age to an adult prison is to place the offender in an environment that may be more appropriate to the offender's age and needs or to take the offender out of an environment which is

no longer appropriate for the offender or in which his or her presence is no longer appropriate.

[67] Where the offender who was sentenced as a child is transferred to the adult prison, the intention of s 211(5) of the *JJA* is that the *CSA* applies to that person, subject to the qualification set out in s 211(6) of the *JJA*.

[68] An important factor that is covered by s 211 of the *JJA* is the preservation of the benefit of the fixed release order, when the offender who is transferred is covered by the *CSA* rather than the *JJA*. Section 211(6) of the *JJA* gives the offender who is the subject of the transfer order to the adult prison the benefit of taking with him or her the entitlement to be released, as if the transfer order had not been made, but recognising that the release from the adult prison will be on parole as regulated by the *CSA* rather than as a fixed release order. The advantage that s 211(6) of the *JJA* gives the offender who has transferred to the adult prison is that the offender does not have to apply for parole under the *CSA*, but is entitled to be released on parole under the *CSA* at the date he or she would have been released under the fixed release order, if the transfer order under s 211(1) of the *JJA* had not been made.

[69] Another consideration that s 211 of the *JJA* attempts to reflect is that the release of the offender on the date of the fixed release order keeps the offender subject to some degree of supervision. It is not an unconditional release. If no transfer order were made under s 211 of the *JJA*, the offender's release from detention under the fixed release order means that the offender whilst in the community remains subject to being controlled under the *JJA* for the balance remaining of the period of detention, after the offender's release under the fixed release order.

[70] The intention of s 211(6) of the *JJA* is that when the offender who has transferred to the adult prison is released before the end of the term of imprisonment to which the period of detention has been converted under s 211 of the *JJA*, control over the offender is maintained by application of the parole regime under the *CSA*, rather than the fixed release order. Although s 211 of the *JJA* refers to the *Corrective Services Act* 1988, that was replaced by the *CSA*, the provisions relating to parole are not relevantly different. As with the fixed release order, the parole regime under the *CSA* requires there to be some part of the sentence that remains to be served at the date of release: s 144(1) *CSA*. Under s 153 of the *CSA*, a prisoner on post-prison community based release is taken to be still serving the sentence imposed on the prisoner. See also s 154 *CSA* and compare s 190 *JJA*.

Statutory constraints when further sentence imposed

[71] It was not in issue when Holmes J sentenced the respondent for the assault that a cumulative sentence had to be imposed in compliance with s 156A of the *PSA* because the offence was committed whilst the respondent was serving a term of imprisonment.

[72] What is meant by a cumulative order of imprisonment is explained in s 156(1) of the *PSA*:

> "If—
> (a) an offender is serving, or has been sentenced to serve, imprisonment for an offence; and
> (b) is sentenced to serve imprisonment for another offence;

> the imprisonment for the other offence may be directed to start from the end of the period of imprisonment the offender is serving, or has been sentenced to serve."

[73] This raises the question of what was the "period of imprisonment" that the respondent was serving when the cumulative sentence for the assault was imposed. The definition of "period of imprisonment" in s 4 of the *PSA*, which is relevant to the respondent before the further sentence was imposed on him by Holmes J, is that "period of imprisonment" includes a term of imprisonment. The phrase "term of imprisonment" is defined in s 4 of the *PSA* and relevantly means "the duration of imprisonment imposed for a single offence". The application of these definitions to the respondent depends on the construction given to s 211 of the *JJA*.

Construction of "unserved part of the period of detention" in s 211 *JJA*

[74] As s 211 of the *JJA* has to be construed as it stood when the transfer order was made in respect of the respondent, it is Reprint No 5 of the *JJA* that is relevant. Unless otherwise indicated, the references to the *JJA* hereafter are to Reprint No 5.

[75] There is no definition of the phrase "period of detention" in s 5 of the *JJA* which sets out definitions for the *JJA*. Throughout the *JJA* the phrase "period of detention" is generally used in the sense of referring to the entire period of detention imposed by the sentencing judge without regard to the effect of any fixed release order that will apply to that period of detention. This is illustrated by ss 6(4), 96(1), 102(1), 107B(3), 167(1), 168, 169, 170, 171, 172, 173, 174(1), 180, 187, 188, 190, 191(6) and 210(4) of the *JJA*.

[76] One example of where the phrase "period of detention" is not used in this context is the definition of "period of detention" in s 211(7) of the *JJA*. That definition is for the special purpose of working out the period of detention prior to the making of a transfer order under s 211 of the *JJA* when an offender has been ordered to serve a further period of detention cumulatively with a period of detention being served. In such a case, "period of detention" is defined to include the further period of detention. This special definition does not assist in the construction of the words in s 211(1) of the *JJA* of "the unserved part of the period of detention".

[77] Section 211(1) applies to "a person serving a period of detention under a detention order". Consistent with how the expression "period of detention" is used throughout the *JJA*, the natural meaning to be given to these words where they first occur in s 211(1) of the *JJA* is the period of detention imposed by the sentencing judge: *Smith v Queensland Community Corrections Board* [2002] 1 Qd R 448, 449. The later reference in s 211(1) of the *JJA* to "the unserved part of the period of detention" takes its meaning from the first reference to "period of detention" in s 211(1) of the *JJA*. That suggests that "the unserved part of the period of detention" is that part of the entire period of detention imposed by the sentencing judge that has not been served when the application for the transfer order is made. If that were correct, it would be that unserved part of the period of detention that is then required to be served as a term of imprisonment upon the making of the transfer order, subject to the operation of the other provisions of s 211 of the *JJA*.

[78] Construing "unserved part of the period of detention" in this way is consistent with the regime proposed under s 211(6) of the *JJA* that the offender who has been

transferred to the adult prison is released on parole on what would have been the date that the fixed release order took effect, had the transfer not taken place, and this allows the offender to be supervised on parole for what remains to be served at the fixed release date of the balance of the term of imprisonment into which the unserved part of the period of detention had been converted.

[79] Section 211(6) of the *JJA* maintains the advantage of the offender sentenced under the *JJA* given by the fixed release date by the automatic release of the offender on parole on the date that would have been the date of the fixed release order, but for the transfer, except in the specific circumstances provided for in s 211(6) of the *JJA*. Relevantly, one of those circumstances is where the offender is required to be held in custody for another reason. That suggests that the intention of the Legislature was to preserve for the offender who is the subject of the transfer order the advantage of the fixed release date, with specified exceptions. The exception of the offender being required to be held in custody for another reason does not discriminate as to the length of that custody (a short or long term of imprisonment) or its purpose (a sentence or remand).

[80] Although the effect of s 188 of the *JJA* is to give an offender certainty as to the offender's release date, that release is under supervision and a continuance of the release depends upon whether the offender can avoid contravening a condition imposed on the fixed release order that results in the revocation of the order. The requirement that the child offender be released on the fixed release order at the time that is determined under s 188 of the *JJA* does not necessarily have the consequence that no part of the remaining period of detention will be served by that offender.

[81] The transfer of the offender to an adult prison, so that the offender serves the unserved part of the period of detention as a term of imprisonment, required specific legislative accommodation as to how the offender could benefit from the fixed release order. It is not a question of looking for an intention of the Legislature to deprive the offender of the right to release on the date that effect would have otherwise been given to a fixed release order for that offender, if that offender had remained in a detention centre. It is a question of looking for the scheme the Legislature has devised for treating that offender in the adult prison. That is found in subsections (4), (5) and (6) of s 211 of the *JJA*.

[82] The competing construction of s 211 of the *JJA* which was preferred by Holmes J construes the phrase "unserved part of the period of detention" as that part of the period of detention that remains to be served between the date of the transfer order and the date the fixed release order is due to take effect. This has the consequence that the term of imprisonment would be completed at the date the fixed release order would have taken effect, but for the transfer order. The difficulty with that construction is that the intention of s 211 of the *JJA* is that, upon the making of the transfer order, there is no further operation given to the original sentence of detention imposed on the offender under the *JJA*, apart from that preserved by s 211 of the *JJA*. This construction of s 211 of the *JJA* also does not accommodate the intention found within s 211 of the *JJA* that there be some period of the term of imprisonment still outstanding at the date the fixed release order would otherwise have taken effect, so that the offender is able to be supervised on parole from that date.

[83] The construction favoured by the respondent has arisen because of the harsh consequence of the imposition of a cumulative sentence on an offender such as the respondent, if s 211 of the *JJA* is given its natural meaning. The construction favoured by the respondent is not required to achieve the factors that s 211 of the *JJA* attempts to accommodate, if the offender was not in a position of being required to be held in custody for another reason at the date he was otherwise due to be released on parole when a fixed release order would have taken effect, but for the transfer order. Section 211 of the *JJA* should be given the same operation, whether or not there is ultimately any impediment to the offender being released on the date that a fixed release order would have taken effect, but for the transfer order. The term of imprisonment into which the unserved part of the period of detention is converted at the date of the transfer order is calculated at that date, when it is unknown whether or not the offender will be required to be held in further custody for another reason.

[84] One of the effects of the amendment of s 211(6) of the *JJA* by the *Juvenile Justice Amendment Act* 2002 was to limit the exception of further custody, so that it only applies where the continued custody is for the unserved part of any sentence of imprisonment imposed against the person. This change did not otherwise affect the scheme for conversion of the unserved part of the period of detention to a term of imprisonment on the making of a transfer order that was found in s 211 of the *JJA*. The explanatory note for the amendment made by the *Juvenile Justice Amendment Act* 2002 does not suggest otherwise.

[85] With respect to s 270 of the *JJA* (as it currently appears in the *JJA*), the reference to "unserved part of any sentence of imprisonment imposed against the person" in s 270(8)(b) must refer to a sentence of imprisonment other than that into which the unserved part of the period of detention was converted on the making of the transfer order. The latter was not a "sentence of imprisonment" when it was imposed on the offender under the *JJA*. It would be a nonsense if the exception in s 270(8)(b) of the *JJA* were construed to operate in respect of the sentence of imprisonment into which the unserved part of the period of detention had been converted upon the making of the transfer order.

[86] Determining the true construction of s 211(1) of the *JJA* is not assisted by the explanatory note for the *Juvenile Justice Legislation Amendment Bill* 1996 that relates to the amendment of s 211. As indicated above, without resorting to extrinsic material the phrase "unserved part of the period of detention" in s 211(1) of the *JJA* can be given a meaning which gives effect to all parts of the provision and is consistent with the use of the phrase "period of detention" generally throughout the *JJA*. Under s 14B(1) of the *Acts Interpretation Act* 1954 consideration may be given to extrinsic material capable of assisting in the interpretation of a provision whether it is to confirm the interpretation conveyed by the ordinary meaning of the provision, to provide an interpretation where the provision is ambiguous or obscure or to provide an interpretation that avoids a result that is manifestly absurd or unreasonable. The explanatory note is itself ambiguous. Where it explains that using the term "unserved part of the period of detention" is so as to leave no doubt that what is being transferred is "the balance of the period left to be spent in actual custody", it suggests that what is being transferred is the period of detention up to the date on which the fixed release order would have taken effect. That is inconsistent with the further statement in the explanatory note that "The intention is to carry out the original intention of the sentencing court as to the length

of actual detention, despite the physical transfer to a prison." The latter statement is consistent with the regime proposed by the actual wording of the provision that the offender is released on parole on the same date that the offender would have been released, if the transfer to the adult prison had not taken place, so that (apart from the specified exceptions which are expressly recognised in the explanatory note) the length of actual custody in the adult prison remains the same as it would have been had the offender remained in the detention centre.

[87] Under s 14B(2) of the *Acts Interpretation Act* 1954, in determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be had to the desirability of a provision being interpreted as having its ordinary meaning (which is that conveyed by a provision having regard to its context in the Act and to the purpose of the Act) and other relevant matters. As the ordinary meaning of s 211 of the *JJA* gives it an operation capable of consistent application, the ambiguity of this explanatory note means that little (if any) weight should be given to the explanatory note.

[88] The particular circumstances of the respondent that have raised this question of construction of s 211 of the *JJA* highlight the harshness with which the provision can operate. Despite that harshness, I am persuaded that the proper construction of s 211(1) of the *JJA* is that advanced by the appellant, because it gives effect to the ordinary meaning of s 211 of the *JJA*, results in a consistent application of the provision whether or not the offender who is the subject of the transfer order is sentenced to a further term of imprisonment after being transferred to the adult prison, and accommodates all of the factors which are relevant to the application of s 211 of the *JJA*.

[89] As the appellant's submissions recognised, the extreme harshness of this outcome is mitigated by the fact that Holmes J was required by s 157(3) of the *PSA* to make, and did make, a recommendation for eligibility for post-prison community based release when imposing the cumulative sentence.

[90] When Holmes J published the reasons for judgment, her Honour reiterated at paragraph [21] for the benefit of any authority considering the respondent's application for parole that the recommendation had been made by her Honour "to recognise the pressing need for furtherance of [the respondent's] rehabilitation". It must be of concern that more than 12 months have passed since 15 June 2004 which was the date on which her Honour recommended that the respondent be eligible for parole. It appears from what Mr Logan SC suggested during submissions on the hearing of this appeal that uncertainty about the date of expiry of the cumulative sentence that would be relevant for the length of the parole supervision has contributed to the failure of the respondent to gain parole.

[91] The respondent is still a young man. It must be relevant to any parole decision that, when Holmes J sentenced the respondent for the assault, he had almost served half of the period of detention that was originally imposed on him as a child and that her Honour considered it appropriate that the cumulative sentence of three years that her Honour imposed on the respondent should postpone his eligibility for parole only by a period of 12 months.

Orders

[92] It follows that the orders which should be made are:

1. Appeal is allowed;
2. The declaration made by Holmes J on 10 December 2004 is set aside;
3. It is declared that the term of imprisonment of three years imposed by Holmes J on 29 May 2003 commences on 18 June 2009 or such earlier date that is determined after taking into account any remission granted in relation to the term of imprisonment being served by the respondent as a result of the transfer order made by the President of the Children's Court on 26 June 1998;
4. Application SC No 484 of 2002 is dismissed.