# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Department of Communities v Sariman* [2005] QCA 360 |
| PARTIES: | **DEPARTMENT OF COMMUNITIES**<br>(applicant/respondent)<br>**v**<br>**ARTHUR ARNOLD SARIMAN**<br>(respondent/applicant) |
| FILE NO/S: | CA No 141 of 2005<br>DC No 25 of 2005 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for leave s 118 DCA (Criminal) |
| ORIGINATING COURT: | Children's Court of Queensland at Brisbane |
| DELIVERED ON: | 30 September 2005 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 August 2005 |
| JUDGES: | McPherson and Jerrard JJA and Dutney J<br>Separate reasons for judgment of each member of the Court, McPherson JA and Dutney J concurring as to the orders made, Jerrard JA dissenting in part |
| ORDERS: | **1. Application for leave to appeal granted**<br>**2. Appeal allowed**<br>**3. Order below set aside** |
| CATCHWORDS: | CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – JUVENILE OFFENDERS – SENTENCING AS A CHILD OR ADULT AND IMPRISONMENT – where applicant was sentenced to a period of detention under the *Juvenile Justice Act* 1992 – where an application was made seeking the applicant's transfer to an adult facility to serve the unserved part of the period of detention as an adult prisoner – where the applicant was sentenced to a collective term of imprisonment to be served cumulatively upon the period of detention while serving the period of detention – whether the Children's Court judge had the power to make order under s 270(1) of the *Juvenile Justice Act* 1992 to commence from the date the applicant was entitled to release on the supervised release order<br><br>*Corrective Services Act* 2000 (Qld)<br>*Juvenile Justice Act* 1992 (Qld), s 8, s 176, s 220, s 227, s 228, s 230, s 270 |

*R v Uittenbosch* [2004] QSC 439; SC No 484 of 2002, 10 December 2004, applied
*Uittenbosch v Department of Corrective Services* [2005] QCA 300; Appeal No 168 of 2005, 19 August 2005, applied

COUNSEL: J Taylor for the applicant
K Parrott for the respondent

SOLICITORS: Logan Youth Legal Service for applicant
C W Lohe, Crown Solicitor, the for respondent

[1] **McPHERSON JA:** I agree with the reasons of Dutney J for allowing this appeal and setting aside the order made on 3 May 2005.

[2] **JERRARD JA**: In this matter I have read the judgment of Dutney J and respectfully agree with His Honour's reasons; and while the decision of this Court in *Uittenbosch v Department of Corrective Services* [2005] QCA 300 mandates the result, I will give my own reasons for respectfully agreeing with the majority view in that appeal. I also suggest a different order from that Dutney J proposes.

[3] The provisions of the *Juvenile Justice Act* 1992 (Qld) ("the JJA") provide in s 176 for periods of detention for a child found guilty of a serious offence, one punishable by a sentence of life or 14 years if committed by an adult.[1] There are provisions for maximum terms of seven years, or, for offences punishable by sentences of life imprisonment when committed by an adult, maximum terms of 10 years, or up to and including life if the offence involves the commission of violence and the sentencing court considers it to be a particularly heinous one having regard to all the circumstances. An order of imprisonment for up to seven years, or up to 10 years, or up to life, made pursuant to s 176(2) or (3), can be made with or without a conditional release order pursuant to s 220.

[4] Section 227 of the JJA provides that unless a court makes an order under s 227(2), a child sentenced to serve a period of detention must be released from detention after serving 70 per cent of the period of detention. Section 227(2) permits a court to make an order for the release of a child from detention after the child has served 50 per cent or more, and less than 70 per cent, of the period of detention. Section 228 provides that at the end of the period after which a child is required to be released under s 227, the Chief Executive must make a supervised release order releasing the child from detention. The Chief Executive may impose conditions, which conditions generally resemble the conditions which may be imposed in either a probation or a parole order.

[5] Section 230 provides that a period of time for which a child is released from detention under a supervised 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. That is a provision specifically ensuring that "street time" spent on a supervised release order counts as time served under the detention order.

[6] Section 270(1) provides that subject to subsection (2), a person serving a period of detention under a detention order, or the Chief Executive, may apply to a Children's

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1 Section 8 of the JJA

Court judge for an order that the unserved part of the period of detention be served as a term of imprisonment. I agree with the submission of Ms Taylor, and the judgment of Holmes J at first instance in *R v Uittenbosch* [2004] QSC 439 at [15] thereof, upheld on appeal, that the expression "unserved part of the period of detention" means a period not yet served, which must pass before the child is due to be released on the supervised release order. I respectfully disagree with Mr Parrott for the Department of Communities, who submitted that the expression "unserved part of the period of detention" referred to the entirety of the remainder of the period of detention. Mr Sariman was sentenced to seven years detention on 20 November 2002, and the sentencing judge ordered that time spent in pre-sentence detention from 26 December 2001 until 20 November 2002 be regarded as part of the sentence already served. The learned judge also ordered that Mr Sariman be released after serving 50 per cent of that seven year term. The effect of the judge's order was that the three and a half years which would run before Mr Sariman reached the date of his supervised release order began on 26 December 2001 and ended on 25 June 2005.

[7] On Mr Parrott's argument, the unserved part of the period of detention would end on 25 December 2008. He acknowledged that on his submission the Chief Executive could apply to a Children's Court judge in June 2008 for an order that the unserved part of the period of detention be served as a term of imprisonment. On Mr Parrott's argument, Mr Sariman might have been released on a supervised release order on 25 June 2005, having not re-offended before then, and even though he had not re-offended after then, the application under s 270(1) could still be made in accordance with the Act. Mr Parrott submitted that the order that would be sought would be an order under s 270(7) converting the remainder of the supervised release order period to an order for release on parole.

[8] That submission actually does violence to the language to s 270(7), and I consider that it is at odds with the underlying assumption in s 270 and its object. The plain object of the orders permitted under s 270(1) is to allow removal of those who are now adults from juvenile institutions, in which they are undergoing terms of detention imposed on them when still children. The underlying assumption is that there is a person who is 18 years or more serving a period of (actual) detention under a detention order imposed on that person as a child. Since s 228 provides that the Chief Executive *must* make a supervised release order at the end of the period after which the child is required to be released under s 277 – the section specifying automatic release after serving 70 per cent, or on the order of the court, after serving 50 per cent or more but less than 70 per cent - a child sentenced to detention and who has not re-offended while in detention will only be serving a period of (actual) detention under a detention order until the child reaches the supervised release order date.

[9] The definition of the expression "period of detention" in s 270(9) caters for the situation of a child who re-offends as a child, and who is sentenced to further and cumulative periods of detention as a child. Either orders will have been made under s 227 regarding those cumulative periods of detention, or the 70 per cent rule will apply to those; whatever the position, there will be an identifiable date on which the child serving the cumulative periods of detention will be entitled to release under a supervised release order.

[10] The provision in s 270(4), namely that an order under s 270(1) (that the unserved part of the period of detention be served as a term of imprisonment) 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, should be understood as providing that a s 270(1) order is an order that the child should be taken to be sentenced to (actual) imprisonment for a period equal to the length of the unserved part of the period of detention. That period of actual imprisonment would end on the date on which the child would have been entitled to release under s 228 on a supervised release order.

[11] That construction is consistent with s 270(7), which provides that person may only, and must, be released on parole on the date the person would have been released under a supervised release order if the order under s 270(1) had not been made. Release on parole brings to an end the sentence of actual imprisonment taken to have been ordered pursuant to s 270(4).

[12] It is important to contrast the use of the expression "sentence of imprisonment" in s 270(8), with the use of the expression "period of detention" in s 270(1) and s 270(9). I agree with Ms Taylor that it is impermissible to construe "unserved parts of the period of detention" in s 270(1) as meaning "unserved parts of the period of detention, including cumulative periods of imprisonment imposed as an adult".

[13] I agree with Dutney J that once Mr Sariman reached the date 25 June 2005, still in detention, and with no cumulative terms of *detention* ordered against him, he was entitled to release on that date under a supervised release order. He was also obliged then to commence serving terms of imprisonment, not detention, ordered against him when he was an adult. Section 270(1) did not give a court jurisdiction to order his transfer to an adult prison *on* 25 June 2005, when there was no unserved part of the period of detention, as was ordered here. That transfer would have occurred without any court order, simply by reason of the warrants for Mr Sariman's imprisonment. Those were issued respectively on 31 May 2004 in respect of an order made 10 September 2003 that Mr Sariman be imprisoned for 14 days, with that sentence of imprisonment to be served cumulatively "to the existing sentence" that Mr Sariman was serving; on 3 November 2003 in respect of an order made on that same date that Mr Sariman be imprisoned for a period of three months, to be served cumulatively upon the period of imprisonment imposed on 10 September 2003; and on 10 June 2004, when Mr Sariman was sentenced to imprisonment for one month to be served cumulatively upon the period of imprisonment "presently being served".

[14] A court would have had jurisdiction to order Mr Sariman's transfer to an adult prison on any date after he turned 18 and before 25 June 2005, but that was not the order made in this case. The application by the Chief Executive of the Department of Communities was made on 16 February 2005, and was for an order that Mr Sariman's unserved part of the periods of detention in relation to the offences committed when he was a child be served as a period of imprisonment. So far so good, but the application actually made to the court was for an order for a transfer to take effect on 25 June 2004, from the date of the supervised release order. Had the order been for a transfer on, say, 20 June 2005, there would have been jurisdiction to make it, as Mr Sariman's counsel agreed both before the learned trial and before this Court. Had an order in those terms been sought and made, then s 270(7) of the JJA would have entitled Mr Sariman to release on *parole* on 25 June 2005, but that right in turn would have been subject to those orders for cumulative terms of

imprisonment. Those terms of imprisonment would have pushed Mr Sariman's parole date back by, at most, four months and 14 days.

[15] The only order made was for a transfer on 25 June 2005. That order for transfer was invalid. In principle, Mr Sariman should have the same rights as if that order had not been made. Had it not been, he may have been released from detention on a supervised release order, and then transferred to prison to serve the terms of imprisonment. When released from those, he would have been subject to the terms of the supervised release order.

[16] However, that would produce a very odd result. Mr Sariman would then be only required to appear before a Children's Court if charged with contravening the terms of that supervised release. Such Children's Court could, at worst, order further detention, not imprisonment. To avoid that consequence I would give leave to appeal, but rather than setting aside the order made below on 3 May 2005, I would vary it so that it was an order for transfer on 24 June 2005. That would have the effect of subjecting Mr Sariman on his release from those cumulative terms – and any other terms of imprisonment ordered against him – to the parole regime provided for adult offenders under the *Corrective Services Act* 2000. I was not persuaded by Ms Taylor's arguments that Mr Sariman would clearly suffer any identifiable disadvantage if treated as an adult when an adult.

[17] **DUTNEY J:** On 20 November 2003, Mr Sariman was sentenced to a period of detention under the *Juvenile Justice* Act 1992 (Qld) of seven years. He was ordered to be released after serving 50 per cent of that sentence under a supervised release order. Taking account of the time already served, the release date was 25 June 2005. At the time of sentencing, Mr Sariman was 17 years old.

[18] On 31 January, 2005, an application was filed seeking Mr Sariman's transfer to an adult facility to serve the unserved part of the period of detention as an adult prisoner. That application was heard in the Children's Court on 3 May 2005. On that date the primary judge ordered that the unserved part of the period of detention be served as a term of imprisonment from 25 June 2005. The distinction between a "period of detention" and a "term of imprisonment" under the *Juvenile Justice Act* is that the latter is served in an adult prison under the terms of the *Corrective Services Act* 2000 (Qld), while the former is served as a juvenile and is governed by the provisions of the *Juvenile Justice Act.*

[19] While serving the period of detention the applicant was sentenced to a collective term of imprisonment of four and a half months to be served cumulatively upon the period of detention. The offences for which this additional sentence was imposed were committed by Mr Sariman while in the Brisbane Youth Detention Centre after he had become an adult.

[20] The appeal is against the order of the Children's Court that the unserved part of the period of detention be served as a term of imprisonment.

[21] At the time the appeal was argued, this Court had not handed down its decision in *Uittenbosch v Department of Corrective Services* [2005] QCA 300.

[22] *Uittenbosch v Department of Corrective Services* is authority for the proposition that the "unserved part of the period of detention" for the purposes of s 270 of the

*Juvenile Justice Act* 1992 (referred to in *Uittenbosch* under its previous numbering, s 211) ends at the time the offender becomes entitled to be released on supervised release under a fixed release order.

[23] In *Uittenbosch*, the relevance of the point was that if the Court had decided the issue differently, the juvenile, who had been sentenced to a cumulative period of imprisonment for offences committed after transfer to the adult prison, would not have commenced the cumulative period of imprisonment until after the completion of the whole of the term of imprisonment to which his period of detention had been converted. In that case, rather than commencing the cumulative term after six years, that term would not have commenced until the expiration of twelve years and the juvenile would have been required to serve an additional six years imprisonment.

[24] Section 270 of the *Juvenile Justice Act* provides as follows:

> (1) Subject to subsection (2), a person serving a period of detention under a detention order, or the chief executive, 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.
> …
> (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.
> …
> (6) The *Corrective Services Act 2000* applies to a person imprisoned under the order.
> (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.

[25] If the order appealed from stands, Mr Sariman perceives two disadvantages. The first is that the conditions of post-prison community based release under the *Corrective Services Act* are more onerous than the conditions of supervised release under the *Juvenile Justice Act.* The second is that if a person released under a supervised release order breaches the terms of release and is returned to detention the time spent at liberty under the release order is counted as time served under the original detention order whereas it is not so treated if the offender is released under an order for post-prison community based release.

[26] For present purposes it is not necessary to determine if either of those concerns is valid.

[27] The only issue that arises for determination here is whether the Children's Court judge had the power to make the order under s 270(1) to commence from the date Mr Sariman was entitled to release on the supervised release order.

[28] In my opinion, this question is definitively settled by the decision of this Court in *Uittenbosch.* If the unserved part of the period of detention for the purposes of s 270 of the Act terminates at the time the juvenile is entitled to release under a fixed

release order, there is no unserved part of the period of detention to which the Children's Court order could attach.

[29] The respondent has invited this Court to reconsider the decision in *Uittenbosch.* That decision was handed down on 19 August 2005. While I acknowledge the force of the dissenting judgment of Mullins J, the draconian consequences of departing from the majority view are such that it would require much clearer language than is to be found in the relevant parts of the *Juvenile Justice Act* to persuade me to adopt a different view. In my opinion, the point having been decided only recently, it is antithetical to the desirable goal of certainty in the law to reconsider that decision unless I was satisfied that the majority decision was plainly wrong. I am not.

[30] I would give the applicant leave to appeal, allow the appeal and set aside the order below.