SUPREME COURT OF QUEENSLAND

CITATION:	*R v Muller* [2005] QCA 417
PARTIES:	**R** **v** **MULLER, Shane Richard** (applicant/appellant)
FILE NO/S:	CA No 267 of 2005 DC No 2887 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2005
JUDGES:	Williams and Jerrard JJA and Atkinson J Separate reasons for judgment of each member of the Court, Jerrard JA and Atkinson J concurring as to the orders made, Williams JA dissenting
ORDERS:	**1. Grant the application for leave to appeal against sentence and allow the appeal** **2. Set aside the order made 12 October 2005 activating eight months of the suspended sentences and order instead that the applicant be sentenced to imprisonment which expires on 11 November 2005**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – PROPERTY OFFENCES – applicant sentenced in August 2002 to four years imprisonment suspended after 18 months operational for four years in relation to 32 property-related offences – applicant breached suspended sentence in early 2004 – drug rehabilitation order imposed in June 2004 as part of sentence for those offences breaching suspended sentence – District Court judge dealing with breach adjourned November 2004 hearing to allow applicant to show further evidence of drug rehabilitation – different District Court judge in October 2005 activated eight months of the two and a half years suspended imprisonment –

applicant had appalling and lengthy criminal history explained by drug addiction – applicant has not re-offended since May 2004 – applicant has gained employment and purchased a house with his partner whilst continuing rehabilitation – whether judge gave insufficient weight to rehabilitation efforts when activating part of suspended sentence – whether applicant is at less risk of re-offending whilst on probation rather than in prison

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – RECOGNISANCES, PROBATION AND OTHER NON-CUSTODIAL ORDERS – PROBATION ORDERS AND SUSPENSION OF SENTENCE – GENERALLY – s 144(6)(b) of the *Penalties and Sentences Act* 1992 (Qld) limits the length of an operational period for a suspended sentence to five years – a court dealing with an offender for breaching a suspended sentence exercises powers under s 147 of that Act which include the power to extend the operational period by one year – whether the operational period can be extended by s 147(1)(a) for a period exceeding five years in total – whether the judge erred in holding that he was unable to extend the operational period by one year to six years in total – whether a court dealing with an offender for breaching a suspended sentence can impose an intensive correction order

Criminal Code 1899 (Qld), s 16
Drug Rehabilitation (Court Diversion) Act 2000 (Qld), s 19, s 20, s 36
Penalties and Sentences Act 1992 (Qld), s 144, s 146, s 147

R v Waters [1997] QCA 439; [1998] 2 Qd R 442, applied
R v Skinner; ex-parte Attorney-General [1999] QCA 521; [2001] 1 Qd R 322, applied

COUNSEL: M A Green for the applicant/appellant
R G Martin SC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Jerrard JA and I will not repeat unnecessarily matters contained therein. Those reasons contain a full outline of the applicant's appalling criminal history, including the numerous occasions on which he has been subjected to community based orders after committing serious offences. His past history demonstrates that probation, community service, suspended sentences and intensive correction orders have not dissuaded him from continuing to commit serious crimes. That much of his offending has been related to drug addiction cannot be regarded as a mitigating factor.

[2] Given that history it could be said that he was dealt with extremely lightly on 20 August 2002 when he was sentenced to four years imprisonment suspended after serving 18 months with an operational period of four years for a wide variety of serious offences, including 14 counts of unlawful use of a motor vehicle and 17 counts involving the breaking and entering or entering of premises.

[3] That suspended sentence was breached on 24 May 2003 when the applicant committed the offence of disqualified driving. On 4 December 2003 the applicant was dealt with in the District Court for that breach of the suspended sentence and the learned judge was then persuaded to act under s 147(1)(a)(i) of the *Penalties and Sentences Act* 1992 ("the Act") by ordering that the operational period of the original suspended sentence be extended by a further 12 months.

[4] The applicant scoffed at the order made on 4 December 2003. In fact, unbeknown to the District Court judge on 4 December 2003, the applicant had committed a number of offences of dishonesty between 27 August and 25 September 2003. He committed further offences in January and February 2004. All of those offences, which included forgery, stealing, wilful damage to property, unlawful use of a motor vehicle, entering a dwelling and committing an indictable offence, and entering premises and committing an indictable offence, were dealt with in the Magistrates Court on 22 June 2004.

[5] In the circumstances more fully outlined in the reasons for judgment of Jerrard JA it is the conviction for those offences recorded on 22 June 2004 which constituted the breach of the suspended sentence originally imposed on 20 August 2002 and which brought about the order on 12 October 2005 that he serve eight months imprisonment, being part of the original suspended sentence. It is from that order of 12 October 2005 that he seeks leave to appeal.

[6] The contention of the applicant is that the order made on 12 October 2005 requiring the applicant to serve eight months imprisonment was "manifestly excessive" in all the circumstances. The submission by counsel for the applicant, both before the primary judge and this Court, was that the appropriate order was one extending the operational period applicable to the suspended sentence by a further 12 months. The submission was that such an order could be made pursuant to s 147(1)(a)(i) of the Act. Alternatively it was submitted to this Court that the applicant could be ordered to serve any period of imprisonment required to be served pursuant to an order under s 147(1)(c) by way of an intensive correction order.

[7] For the reasons given by Jerrard JA, applying *R v Waters* [1998] 2 Qd R 442 and *R v Skinner, ex parte Attorney-General* [2001] 1 Qd R 322, I am of the view that a court acting pursuant to s 147(1)(b) or (c) could not order pursuant to s 112 of the Act that the term of imprisonment activated by the order be served by way of an intensive correction order.

[8] Given the submissions addressed to this Court, and at first instance, it is necessary to examine in some greater detail the power of the court to extend an operational period. The starting point is s 144(5) and (6) which provide:

> "(5) The court must state an operational period during which the offender must not commit another offence punishable by imprisonment if the offender is to avoid being dealt with under section 146 for the suspended sentence.

(6) The operational period starts on the day the order is made and must be—
(a) not less than the term of imprisonment imposed; and
(b) not more than 5 years."

[9] Section 146(1) provides that a court must proceed under the subsequent provisions of that section if the offender is convicted of an offence for which imprisonment may be imposed "during the operational period of an order made under section 144." If that condition is satisfied then the offender is to be ultimately dealt with by a court pursuant to the procedure referred to in section 146(2), (2A), (4) or (6). The powers of the court in so dealing with an offender are set out in s 147(1): the court dealing with the offender may:

"(a) order-
(i) that the operational period be extended for not longer than 1 year; or
(ii) if the operational period has expired when the court is dealing with the offender—
(A) that the offender's term of imprisonment be further suspended; and
(B) that the offender be subject to a further stated operational period of not longer than 1 year during which the offender must not commit another offence punishable by imprisonment if the offender is to avoid being dealt with under section 146 for the suspended imprisonment; or
(b) order the offender to serve the whole of the suspended imprisonment; or
(c) order the offender to serve the part of the suspended imprisonment that the court orders."

[10] It is then provided by s 147(2) that the court must make an order requiring the offender to serve the whole of the suspended period of imprisonment unless it is of the opinion that it would be unjust to do so.

[11] In my view s 144(5) is of critical importance to the whole concept of a suspended sentence and that appears not to have been fully recognised by many judges (even by myself on occasions) in imposing such a sentence. The practice has developed of just saying by way of order that the "operational period is x years". That is strictly insufficient. The order should fully state the terms of s 144(5); the order should formally state that the "operational period during which A.B. must not commit another offence punishable by imprisonment if A.B. is to avoid being dealt with under s 146 for the suspended sentence is x years". That is because it is the breach of that injunction which enlivens the court's power to deal with the offender under s 146.

[12] If the operational period has expired by the time a court is called upon to deal with a breach of the suspended sentence committed during the subsistence of the operational period imposed under s 144 then, if there is to be an extension of the operational period, the court is obliged to set out the terms of the injunction operating throughout that extended period in full. So much is made clear by s 147(1)(a)(ii)(A) and (B). The effect of the original injunction is spent at the

expiration of the period of time for the original operational period and it needs to be expressly restated.

[13] On its face the legislation does not require the restating of the injunction when the order is made pursuant to s 147(1)(a)(i) because at the time an order under that provision is made the original operational period has not expired and the original injunction restraining the offender from committing another offence during the operational period is still operative. However it would be prudent to restate the terms of the injunction in full when extending the period pursuant to s 147(1)(a)(i).

[14] What is the effect then of an order under s 147(1)(a)(i)? It appears to me, reading s 144, s 146 and s 147 together, that what the court is doing when making an order pursuant to s 147(1)(a)(i) is deferring further consideration of dealing with the offender under s 147(1)(b) or (c) consequent upon the breach of condition that the offender does not commit another offence punishable by imprisonment during the balance of the original period or the extended period. If no further offence is committed the court is not called upon to deal further with the breach committed during the original operational period. If a further offence is committed during the balance of the original period or the extended period then the court is required to deal with the offender pursuant to s 147(1)(b) or (c) in consequence of the offender committing the original breach of the injunction, that is the breach which gave rise to the court making the order pursuant to s 147(1)(a)(i) extending the operational period. It is important to appreciate that given s 146(1) the court can only deal with an offender for a breach during the operational period imposed by the order pursuant to s 144.

[15] An order extending the operational period pursuant to s 147(1)(a)(ii) would have the same effect. The subsequent offence would enliven the court's power to deal with the breach committed during the original period; that power being deferred by the order pursuant to s 147(1)(a)(ii). Of course, the offence committed during such extended period would not itself constitute a breach of the suspended sentence entitling the court to act pursuant to s 147.

[16] If the sections are construed in that way then the court in giving consideration to making an order pursuant to s 147(1)(b) or (c) at the later point of time is doing so because it is "satisfied that the offence was committed during the operational period of an order made under section 144", as required by s 146(1). It is obvious that the extended operational period is not an "operational period of an order made under section 144" and in consequence any other construction of the provisions than that which I have suggested would result in a significant hiatus in the court's capacity to deal with an offender who committed an offence punishable by imprisonment during the extended operational period. Further, since in extending the operational period the court is merely deferring dealing with the offender under s 147(1)(b) or (c) no question under s 16 of the *Criminal Code* 1899 (Qld) (offender cannot be punished twice) arises.

[17] Other consequences flow from the fact that s 146(1) makes it clear that only an offence committed during the operational period fixed by the original order under s 144 will enliven the court's powers to deal with the offender under s 147. One question which arises is whether or not there could be unlimited extensions of the operational period by relying on s 147(1)(a)(i); could there be extension of the period for one year on each occasion a further offence was committed. The learned

District Court judge dealing with this matter on 12 October 2005 indicated during argument that in his view an operational period could not, by relying on s 147(1)(a), be extended beyond five years from the day on which the original order of imprisonment under s 144 was made.

[18] It has to be said that the statute does not expressly deal with that point. Prima facie there is nothing to prevent a judge from making orders from time to time under s 147(1)(a) so that there was an injunction hanging over the head of an offender for an indefinite period of time. Adopting such a course creates a problem when it is remembered that ultimately it is only a breach committed during the operational period originally fixed when the order pursuant to s 144 was made that can enliven the jurisdiction of the court to deal with the offender under s 147(1)(b) or (c). Again it must be emphasised that s 147(2) requires the court to deal with the matter under s 147(1)(b) unless it is of the opinion that it would be unjust to do so. All of that points, in my view, to the conclusion that it is implicit in Part 8 of the Act in dealing with suspended imprisonment that the relevant operational period must not be for more than five years. If the statute is not construed in that limited way then judges would be called upon to require an offender to serve a significant period of imprisonment many years after the offence was committed and many years after the offender was first dealt with by the court for the offence in question.

[19] Reading the provisions of the Act in that way does limit the extension of the limitation period provided for in s 147 to those cases where the initial operational period was for less than five years. That in my view is a more reasonable construction than the alternative.

[20] In the present case the applicant was subjected to an operational period of four years when the sentence was initially imposed on 20 August 2002. There was an extension for 12 months, taking the operational period up to five years in consequence of the order of 4 December 2003. On the construction of the legislation for which I contend it follows that the learned primary judge was correct in concluding that he could not further extend the limitation period when dealing with the applicant on 12 October 2005.

[21] In those circumstances the only remaining question is whether or not in requiring the applicant to serve eight months imprisonment, being part of the suspended sentence, the learned primary judge imposed a sentence which was "manifestly excessive".

[22] This Court has in a number of cases considered the factors which are relevant when a judge is determining what order to make pursuant to s 147 consequent upon the commission of an offence during the currency of the operational period fixed when the offender was sentenced relying on s 144; reference need only be made to *R v Bowen* [1997] 2 Qd R 379, *R v Holcroft* [1997] 2 Qd R 392 and *R v Holley; ex parte Attorney-General* [1997] 2 Qd R 407. As is made clear in those authorities the starting point, required by s 147(2), is that the offender should be ordered to serve the full period of imprisonment which was originally suspended unless the relevant circumstances make such an order unjust. Given the reasoning in those judgments it is strictly not appropriate for the Court of Appeal when hearing an appeal from an order made under s 147(1)(c) to consider whether or not the order was "manifestly excessive". There having been no appeal from the original sentence there is no basis for contending that subsequently requiring the offender to serve that sentence

results in the sentence being "manifestly excessive". Rather, consistently with the reasoning in those cases, what this Court is addressing when an appeal is lodged against an order made pursuant to s 147(1)(b) or (c) is whether or not there was an error in the exercise of discretion in that either too little or too much weight was given to one of the circumstances relevant when considering how to deal with an offender pursuant to s 147. As those cases indicate it is relevant and important for the judge so dealing with an offender to have regard to circumstances in mitigation which have arisen since the original sentence pursuant to s 144 was imposed and which would make it unjust for the offender to serve either the whole of the suspended term or that portion of the suspended term in fact ordered to be served.

[23] Before the learned District Court judge on 12 October 2005, and again in submissions addressed to this Court on behalf of the applicant, the principal circumstance relied on was that, particularly consequent upon the order made by the Drug Court, the applicant had taken significant steps towards rehabilitating himself from his drug addiction and that it would be counterproductive to require him to serve any time in custody.

[24] It is clear that the learned District Court judge gave weight to the applicant's rehabilitation. Relevantly he said:

> "When one looks at the seriousness of the offending, the regularity of the offending, the chances you've been given, without the special circumstances, there is prima facie an argument of certain attraction that I should activate in full the unserved two and a half years imprisonment. In deciding whether to activate the suspended part of imprisonment in full, in part or not at all, one looks at a number of matters, including the seriousness of the offences committed whilst the subject of a breach; one looks at personal circumstances - whether they're inter alia, whether there have been efforts at rehabilitation and over what period - and the material makes it quite clear that although there was some earlier hiccups such as absconding on one occasion and testing positive to tetrahydrocannabinol, the active ingredient of Cannabis Sativa, your progress has been good - one might say very good indeed in relation to attempts at rehabilitation over quite some period. There is a substantial volume of material showing the efforts you have made, the improvements you have made, the efforts you have made in your personal life, and you seem to have a good job. That material is so voluminous that not only do I not propose activating the unserved balance of two and a half years imprisonment, but I propose making a substantial reduction there from.
>
> One has to look at the whole picture. You were given the benefit of an early suspension for very serious offending indeed. You have breached it by driving whilst disqualified by a Court order. You were given yet another chance, then you committed all these other offences."

[25] The matters relevant to rehabilitation referred to by the learned District Court judge in that passage are further detailed in the reasons of Jerrard JA and I need not repeat them. As the learned District Court judge noted, the applicant had made significant progress in rehabilitating himself from drug addiction, but that had to be balanced

against the serious, repetitive offending. Clearly the learned District Court judge was persuaded by the efforts at rehabilitation not to require the applicant to serve two and a half years imprisonment, which prima facie he was obliged to do, but to reduce the period of imprisonment to be served to eight months. That demonstrates that significant weight was given to the circumstance of rehabilitation.

[26] The only question for this Court, in my view, is whether or not it has been demonstrated that the learned District Court judge gave insufficient weight to that consideration. Having regard to all of the arguments submitted to this Court I am not persuaded that the applicant has made out such a case.

[27] It follows that the application for leave to appeal against sentence should be refused.

[28] **JERRARD JA:** This matter was an application for leave to appeal from an order made in the District Court on 12 October 2005, that Mr Muller serve eight months imprisonment, part of the two and a half years of suspended imprisonment on 32 offences for which Mr Muller was sentenced to concurrent terms of four years imprisonment on 20 August 2002, suspended after he had served 18 months of that four years. Those four year terms were imposed when Mr Muller pleaded guilty to 14 counts of unlawful use of motor vehicles, 17 counts of breaking and entering (or entering) premises, and one count of dangerous operation of a motor vehicle. He was also sentenced to two years' concurrent imprisonment on 20 August 2002 on nine other counts, likewise suspended after Mr Muller had served 18 months. The learned sentencing judge on 22 August 2002 declared an operational period of four years in respect of all those partly suspended sentences. Mr Muller's counsel, Mr Green, argued on this application that the learned judge activating eight months of those partly suspended sentences on 12 October 2005 had erred in ordering that Mr Muller then serve any part of that suspended imprisonment at that time.

Prior History

[29] Mr Green frankly conceded on this application, and before the learned sentencing judge, that Mr Muller has an appalling record of convictions for dishonesty and for recidivism. That fact was a significant plank in his argument that previous terms of imprisonment have not deterred Mr Muller from re-offending, and that imprisoning Mr Muller again now significantly damages otherwise genuine prospects of having Mr Muller avoid drug abuse and a life of associated dishonesty. Those submissions referred to what both the learned judge presiding on 12 October 2005, and the Crown, readily accepted were significant steps Mr Muller had taken in the last 16 months to effect quite a dramatic change in his life.

[30] Examination of Mr Muller's record of prior court appearances shows both a pattern of continual offending, and also a failure by him to respond to both punitive and non-punitive orders. His first conviction for dishonesty was on 19 February 1993, in the Southport Magistrates Court, and he appeared three more times in a Magistrates Court that year, for offences involving either dishonesty or drugs. In 1994 he appeared on six separate occasions in different courts dealing with criminal offences, and by the end of that year had been sentenced during 1993 and 1994 to fines, community service, probation, completely suspended sentences, and then short terms of imprisonment. Most of the 1994 appearances were for breaching bail conditions or earlier orders for community service and probation; there were also offences of dishonesty and one of dangerous driving.

[31] He appeared in courts exercising criminal jurisdiction six times in 1995, including once on an appeal in this Court, and sentences ordered in 1995 included orders of suspended imprisonment and intensive correction orders. Then on 11 August 1995 this Court ordered that he serve the whole of an 18 month term of imprisonment, imposed and suspended in August 1994. Other court appearances in the latter part of 1995 dealt with offences committed before this Court had ordered he serve the 18 month term.

[32] There were some 1996 court appearances, largely dealing with offences of assaulting police officers committed in 1995, before that 18 month sentence had commenced to be served. He was also dealt with for breaches of probation orders earlier imposed. None of the sentences ordered in 1996 resulted in any increase in the period in actual custody which he was serving.

[33] His record of convictions does not make clear when that 18 month sentence was deemed to commence, nor when he was released, but presumably that happened in the latter part of 1996. On 21 February 1997 he was found in the garden of a dwelling house without lawful excuse, and his record shows that he was held in custody from 27 February 1997 until 3 November 1997; it also records that he began committing offences again in December 1997. He then appeared on 5 March 1998 in the Southport District Court, where he was dealt with for breaking and entering offences, and stealing offences, committed in early February 1997, as well as for offences committed as long ago as January 1995. On that District Court appearance he was sentenced to jail for two years, with the 248 days between 27 February 1997 and 3 November 1997 declared as time already served.

[34] He was then dealt with on 14 September 1998 in the Brisbane District Court for the offences he had committed in December 1997 and January 1998, all committed before that court appearance on 5 March 1998, and sentenced to two and a half years imprisonment, with a recommendation that he be considered eligible for release on parole on and from 14 September 1999; time served totalling 41 days (in broken periods) was taken into account.

[35] Shortly after his release on parole on that sentence he began re-offending. That fact is demonstrated by the dates on which he committed the offences – mid-April 2000 to the end of April 2000 – for which he was next dealt with in the Brisbane District Court on 4 May 2001. Those offences included offences relating to drugs, offences of dishonesty (receiving stolen property, stealing, entering premises, possession of tainted property), common assault, and dangerous operation of a motor vehicle while adversely affected by an intoxicating substance (with one prior conviction for that same offence). On that date (4 May 2001) the District Court attempted to assist Mr Muller by sentencing him to 12 months imprisonment to be served by way of an intensive correction order. It also ordered that he undergo psychiatric or psychological treatment or counselling in relation to his substance abuse.

[36] That order was spectacularly unsuccessful in achieving its object. That is shown by the dates on which Mr Muller committed the 40 offences for which he was dealt with on 20 August 2002 in the Beenleigh District Court, when he was sentenced to the four years imprisonment on 32 counts, suspended after 18 months. The first of the 40 offences dealt with that day was committed on 12 May 2001, one week after he began undergoing that intensive correction order. He continued offending until 28 October 2001, when he was taken into custody; his record shows that those 40

serious offences committed between 4 May 2001 and 29 October 2001 also included a number of offences committed between his release on bail on 18 September 2001 and his re-arrest on 29 October of that year.

[37] On 4 December 2003 Mr Muller was back in the District Court, when he was dealt with for a breach of that suspended sentence constituted by his having committed an offence of disqualified driving on 24 May 2003 (when Mr Muller was sentenced on 20 August 2002, 389 days of pre-sentence custody was declared time already served, and he was released from those sentences on 24 January 2003). The Magistrate dealing with the offence of disqualified driving sentenced Mr Muller to nine months imprisonment wholly suspended for a two year period; the learned District Court judge dealing with Mr Muller on 4 December 2003 for the breach of those suspended sentences constituted by that offence of driving while disqualified remarked that that judge was satisfied from the material placed before the learned judge that Mr Muller was making genuine efforts at rehabilitation. That was not the first time a District Court judge had been so satisfied; the judge imposing the partly suspended sentences on 20 August 2002 said that the judge who had imposed the intensive correction order on 4 May 2001 had felt that there was a glimmer of hope for Mr Muller, and on 20 August 2002 the learned judge then sentencing Mr Muller also said that it seemed Mr Muller had been making an effort, while in custody awaiting sentence, to address the very serious drug problem he had.

[38] The learned judge dealing with Mr Muller on 4 December 2003 held that because of the efforts Mr Muller was making to rehabilitate himself, the judge was satisfied, pursuant to s 147(2) of the *Penalties and Sentences Act* 1992 (Qld) ("the Act") that it would be unjust to order under s 147(1)(b) of that Act that Mr Muller serve the whole of the suspended two and a half years. Instead the learned judge ordered under s 147(1)(a)(i) that the operational period of the suspension be extended by another 12 months; and warned Mr Muller that the first thing that was going to happen to him the next time if he breached those suspended sentences was that he would go to prison.

[39] The genuine efforts at rehabilitation that Mr Muller demonstrated on 4 December 2003 to the District Court judge had not been wholly successful even then, nor were they sustained thereafter. On 22 June 2004 he was dealt with in the Beenleigh Magistrates Court on a number of charges of dishonesty, which included an offence of receiving stolen property committed between 27 August 2003 and 25 September 2003. The other offences for which he was dealt with by the Magistrates Court on 22 June 2004 were committed in January and February 2004. Those offences included possession of tainted property, forgery and uttering, stealing, wilful damage to police property, entering a vehicle with intent to commit an indictable offence, unlawful use of a motor vehicle, and two offences of entering dwellings or premises. The offences committed in early 2004 were a serious breach of the suspended sentences, which now had an operational period expiring 20 August 2007.

[40] The Magistrate sentencing Mr Muller on 22 June 2004 imposed differing terms of imprisonment on those charges, the most significant being sentences of three years imprisonment on the offences of unlawful use of motor vehicles, unlawful entry of motor vehicles, and the offences of entering dwellings or premises and committing indictable offences. The Magistrates ordered, however, that all terms of imprisonment be suspended pursuant to s 20 of the *Drug Rehabilitation (Court*

Diversion) Act 2000 ("the *Rehabilitation Act*"), while Mr Muller underwent an intensive drug rehabilitation order made under s 19 of that Act. The significant beneficial effect that order has had on Mr Muller is the basis for the application to this Court. The Magistrate also ordered on 22 June 2004 that Mr Muller perform 100 hours of community service, and pay restitution of $4,031.

[41] On 22 November 2004 Mr Muller appeared in the Beenleigh District Court, to be dealt with for the breaches of the suspended sentences imposed on 20 August 2002 constituted by the convictions in the Beenleigh Magistrates Court on 22 June 2004. However, his legal representatives persuaded the learned District Court judge that Mr Muller appeared to be responding well to the intensive drug rehabilitation order made five months earlier and that it was inappropriate to sentence him at that time, and appropriate to adjourn the sentence so that Mr Muller could complete the remaining 28 weeks of the program he was undergoing pursuant to that intensive drug rehabilitation order. The Crown conceded that an adjournment for a period to further observe Mr Muller's program "may be suitable"[1]; and that "were it not for that order the Crown would be submitting a complete reactivation of the sentence."

[42] The adjournment was granted and Mr Muller next appeared in a court on 5 August 2005, in the Beenleigh Magistrates Court, which court then (pursuant to s 36 of the *Rehabilitation Act*) reconsidered the initial sentences imposed on Mr Muller on 22 June 2004, vacated the intensive drug rehabilitation order, and imposed sentences of 18 months probation, coupled with orders for restitution of $3,961, on all charges for which Mr Muller had been dealt with on his pleas of guilty on 22 June 2004. Those orders made on 5 August 2005 were made because Mr Muller had successfully completed the ordered rehabilitation program, demonstrating considerable success in stopping illicit drug usage. As required by the order, he had been initially admitted to the Moonyah Residential Rehabilitation Program on 22 June 2004; he absconded on 17 July 2004 and was then remanded back in custody. He began the program again on 10 August 2004, when it was established that he had consumed cannabis during that period in which he had been returned to prison. For that consumption he then served another eight days in prison, and was released again to the Moonyah Residential Program on 24 August 2004; on the information now available he has remained drug free since then, a little over a year, apparently the longest period in his life without non-prescribed drugs since his first court appearances in 1993. He successfully graduated from the Moonyah program on 29 March 2005, and by 12 October 2005 – when the partly suspended sentences were partly activated – had succeeded in gaining employment with the Brisbane City Council and had, with his partner, bought a house into which they had by then moved. His probation order required that he submit himself to fortnightly urine testing, which had been relaxed to once a month testing by reason of what Mr Green submitted to the learned sentencing judge was the "extraordinary rehabilitation which had taken place".

Can an operational period be suspended beyond five years?

[43] Mr Green submitted to this Court, and to the learned sentencing judge, that the appropriate order was one under s 147(1)(a)(i), again extending by one year the operational period of suspension of the sentences imposed on 20 August 2002. That order, if made, would mean the operational period now totalled six years and would

---

1 At AR 115

expire on 20 August 2008. Mr Green submitted that the restriction imposed in s 144(6)(b) applies only when a court is first making an order suspending all or part of a sentence. That section relevantly provides:

> "**144**(1) If a court sentences an offender to imprisonment for 5 years or less, it may order that the term of imprisonment be suspended.
> (2) An order under subsection (1) may be made only if the court is satisfied that it is appropriate to do so in the circumstances.
> (3) An order under subsection (1) may suspend the whole or a part of the term of imprisonment.
> ….
> (5) The court must state an operational period during which the offender must not commit another offence punishable by imprisonment if the offender is to avoid being dealt with under s 146 for the suspended sentence.
> (6) The operational period starts on the day the order is made and must be –
>
> (a) not less than the term of imprisonment imposed; and
> (b) not more than 5 years."

[44] Section 146 describes the circumstances in which an offender placed on a suspended sentence, who commits an offence punishable by imprisonment during the operational period "of an order made under section 144", must be dealt with under s 147 for the suspended imprisonment i.e. for breach of the prohibition on re-offending during the operational period required to be stated by s 144(5). Section 147 provides:

> "(1) A court mentioned in section 146(2), (2A), (4) or (6) that deals with the offender for the suspended imprisonment may –
> (a) order –
> (i) that the operational period be extended for not longer than 1 year; or
> (ii) if the operational period has expired when the court is dealing with the offender –
> (A) that the offender's term of imprisonment be further suspended; and
> (B) that the offender be subject to a further stated operational period of no longer than 1 year during which the offender must not commit another offence punishable by imprisonment if the offender is to avoid being dealt with under s 146 for the suspended imprisonment; or
> (b) order the offender to serve the whole of the suspended imprisonment; or
> (c) order the offender to serve the part of the suspended imprisonment that the court orders.
> (2) The court must make an order under subsection (1)(b) unless it is of the opinion that it would be unjust to do so."

[45] Mr Green submitted that a court exercising power under s 147 could extend an operational period of five years by one year. A consequence of that submission, if accepted, would be that an offender like Mr Muller who returned annually to a court, accompanied by optimistic opinions about rehabilitation, could have an operational period extended year after year until it reached say, 10 years; when a

court ultimately exercised power under s 147(1)(b) or (c) that offender might be ordered to serve all or part of a term of imprisonment imposed 10 years earlier. That consequence does not mean the construction for which Mr Green argues is wrong, however, because that point could also be described as no more than a reason for not exercising a discretion otherwise available to extend an operational period beyond, say, five or six years.

[46] The learned sentencing judge held that s 144(6)(b) applied both to an originally ordered operational period, and to one extended by an order made under s 147(1)(a)(i) or (ii), and that since the operational period applicable to Mr Muller had been extended to five years by the order made on 4 December 2003, there was no power to make any order further extending the operational period. Accordingly, the court could only proceed under s 147(1)(b) or (c). Mr Green argued otherwise, and pointed to the absence of any express restriction in s 147 limiting the capacity to extend an operational period, whether current or expired, beyond five years.

[47] In *R v Waters* [1998] 2 Qd R 442 this Court held that when ordering an offender to serve the whole or part of a term of suspended imprisonment, a court is not "imposing" a term of imprisonment within the meaning of s 157(2) of the Act, and that consequently, upon making an order that all or part of a period of suspended imprisonment be served, a sentencing court cannot make a parole recommendation. In *R v Skinner, ex parte Attorney-General* [2001] 1 Qd R 322 this Court wrote (at 324 – 325):

> "Section 144(1) uses the term "sentences", the term used in s.118, to describe the act of imposing the suspended sentence. By contrast s 144(5) refers to the offender "being dealt with" under s. 146, the provision pursuant to which the court may make the orders to which we have referred under s.147: see s.146(2) and s.146(7). The phrase "deals with" is also used in those subsections as it is in s.147(1). It seems plain from these provisions that it is the court which imposes the suspended sentence which is sentencing the offender and that the court which later orders the whole or part of that suspended sentence to be served is "dealing with" the offender under that sentence, that is making an order pursuant to a sentence already imposed, but not sentencing the offender."

[48] At least two consequences follow from those statements. One is that a court acting under s 147(1)(b) and (c), and activating all or part of a period of previously suspended imprisonment, cannot make an order pursuant to s 112 of the Act that that now activated imprisonment be served by way of an intensive correction order. Mr Green suggested in argument that order would be appropriate, but it is not available. That is because an intensive correction order can only be made by a court that "sentences an offender to a term of imprisonment of 1 year or less", and *Skinner* is authority for the proposition that a court "dealing with" an offender under s 147 is not sentencing that offender. A second consequence is that a court "dealing with" an offender under s 147, and ordering that the operational period be extended for no longer than one year, is not a court exercising power under s 144(1) and sentencing an offender to imprisonment which it orders be suspended. The orders referred to in s 144(2) and (3) are orders made under subsection (1), i.e. by a court that sentences an offender; in my opinion the reference in s 144(6) to "the order" is likewise to an order made under s 144(1) by a court sentencing an offender, and the

operational period described in s 144(5) and (6) is an operational period made by a court exercising the power under s 144(1) to sentence an offender.

[49] If follows that the restriction on the length of an operational period, that it be no more than five years, commanded in s 144(6)(b), can have no effect on orders made under s 147. That restriction applies only to operational periods made on the order of a court sentencing an offender, a term this Court has said does not apply to a court dealing with an offender under s 147. I consider it also follows that the reference to "an order made under section 144" in s 146(1) is to an order made by a court that sentences an offender, which does not include an order extending an operational period made under s 147(1) by a court that is dealing with an offender for the suspended imprisonment.

[50] That means there is a curious hiatus in Part 8 of the Act. Section 146(1) applies only to a court before whom an offender is appearing, when that court is satisfied that offender has committed an offence "during the operational period of an order made under section 144". Section 147(1), in its reference to courts mentioned in "section 146(2), 2A, (4) or (6)", is ultimately referring only to a court described in s 146(1). That is, the express power for a court to deal with an offender for an offence committed during the operational period of a suspended sentence is confined to offences committed during the operational period of orders made under s 144, and not expressed to include orders made under s 144 as extended by orders made under s 147. Construing section 146(1) to include the operational period of an order made under s 144 as extended by an order made under s 147 would be a construction best achieving the purpose of the Act,[2] and thus to be preferred to any other interpretation. But the previous decisions of this Court make that construction unavailable.

[51] The hiatus referred to means that there is no prescribed means for dealing with an offender who re-offends during the extended period of a suspended operational order. That is, an offender originally sentenced to one year's imprisonment wholly suspended for an operational period of two years subsequently extended (on re-offending) by a further one year, and who re-offends yet again during the now third year of that operational period, is liable only to the punishment appropriate for that further offending. There is no mechanism provided in Part 8 of the Act for dealing with that offender for the breach of the extended operational period. This is so despite the attempt to make provision for that in s 147(1)(a)(ii)(B).

[52] Since writing these reasons I have had the opportunity to read the judgment of Williams JA and His Honour's observations on the exercise of the power granted by s 147(1)(a)(i), and the construction of the court's powers suggested by His Honour as a means of overcoming or diminishing the effect of the described hiatus. I observe that His Honour's construction does give s 147(1)(a)(i) some effective application, although a much more limited one than would have been achieved if s 146(1) had relevantly read "an order made under section 144 including any extension of that operational period ordered under s 147(1)(a)". I also respectfully observe that while His Honour's reasoning exhibits its customary clarity and carries considerable authority, it is desirable that this Court hear argument on s 16 of the *Criminal Code* 1899 (Qld) before committing itself to that construction. This Court should likewise hear argument first on the limits on the capacity of a court

---

[2] Section 14A(1) of the *Acts Interpretation Act* 1954 (Qld)

purporting to exercise power under s 146(1)(b) to deal with an offender for an offence committed during an originally ordered operational period, where that offender has already been dealt with under s 147(1)(a)(i) by another court.

[53] I also acknowledge the considerable force in the argument His Honour has made in support of a construction of s 145 limiting the power of extension granted by s 147 to those cases where the initial (or already extended) operational period was for less than five years. Those points are nevertheless also matters relevant to whether or not a discretion to extend an operational period should be exercised, as much as an argument against acknowledging the existence of a power to extend an operational period where there is no expressed statutory restriction. Absent a statutory restriction, I am not prepared to imply one.

[54] That conclusion clears the decks for a finding, which I would make, that the learned sentencing judge was in error in construing s 144 to limit the power given in s 147, and in holding that s 147 did not allow the sentencing judge to extend Mr Muller's operational period by up to one year, thereby achieving a six year operational period. The fact that an error of construction was made requires this Court to re-exercise the sentencing discretion. Had the learned sentencing judge construed the provisions correctly, the judge may also have concluded that there would be no point in extending the operational period by a further one year, when the result might be (subject to what Williams JA has written) that Mr Muller could re-offend during the sixth year of the operational period without risking an order activating either all or part of the, by then, long ago suspended term of imprisonment. Extending the operational period would accordingly have only the same consequences for Mr Muller as the order which Mr Green now submits the learned sentencing judge should have made (if Mr Green's construction was wrong and the sentencing judge was right), namely that the learned judge should have ordered pursuant to s 147(1)(c) that Mr Muller be sentenced to the rising of the court. That sentence would have activated one day of the period of suspended imprisonment. Mr Green conceded that if his argument on construction was wrong, then he had to satisfy this Court that a non-custodial outcome was the only appropriate exercise of the sentencing judge's discretion, having particular regard to the matters specified in s 147(3). That would be the position if the sentencing court was quite satisfied that a non-custodial order was the only order likely to continue rehabilitation, that any other order would irretrievably damage that process, that Mr Muller had been adequately punished already for his 41 offences, and that there was a good prospect he would not re-offend.

[55] The learned judge was clearly not that persuaded Mr Muller was unlikely to re-offend, or that no more prison was appropriate, but was satisfied pursuant to s 147(2) that it would be unjust to order that Mr Muller serve the whole of the two and a half years previously suspended, and the Crown does not challenge that finding. There were reasons for the learned judge to be wary of placing too much reliance on the positive progress Mr Muller had made, because of the previous occasions on which positive hopes had been expressed about his rehabilitation, when he came to be sentenced. There was also a degree of unrealistic expectation about Mr Muller's decision to buy a house when facing re-sentencing, which reflected the risk-taking behaviour that characterised his decade of crime. Ordering Mr Muller to serve eight months of that two and a half years was a pragmatic exercise of the sentencing discretion, and not unkind.

[56] It is accordingly tempting to do exactly the same when re-exercising the discretion, and for that reason simply to dismiss the application for leave to appeal. Mr Green readily conceded in his submissions that had Mr Muller been dealt with earlier, it would not have been unjust to order that he be imprisoned, in fact for a quite lengthy period. But this Court was much pressed by Mr Green with the submission that the extensive rehabilitation which has already occurred, plus the delay, means that imprisonment should not be ordered now; almost a year has elapsed since the order of November 2004 adjourning the proceedings brought to deal with Mr Muller's offending during the operational period. The same submission, of course, was made to the sentencing judge. Mr Green reminded this Court that Mr Muller has performed the 100 hours community service, been under constant supervision, and made the possibly accurate submission that returning Mr Muller to prison puts him at greater risk of his returning to non-prescribed drug use than does keeping him out of jail. He reminded this Court that the supports existing outside the jail included the terms of the 18 month probation order (which largely mirrored the conditions of his earlier rehabilitation program), the ongoing counselling he was said to be receiving from the Alcohol Tobacco and Other Drugs Service, and a good deal of support from the Salvation Army and from his employer, the Brisbane City Council. That employer has held his position open for him, pending the outcome of this appeal. The final argument was that the time he had now gone without offending – since February 2004 (overlooking the cannabis consumption in jail in August 2004) – is for him a very long time, and that the benefit the community will receive if Mr Muller avoids re-offending with that assistance will be considerable, and that this goal is more likely to be achieved by an order that allows the current rehabilitation process to continue uninterrupted than it is by an order returning him now to prison.

[57] There are reasons for having reservation about the ultimate outcome of acceding to that submission, but this is the only one of many opportunities offered to Mr Muller which he has actually taken, and I consider imprisoning him at this time carries a greater risk of his rehabilitation collapsing than continuing it does. The possibility he will not offend again is just sufficient to justify the outcome Mr Green seeks, since Mr Muller's operational period already extends to August 2007. If he does re-offend, it is likely to be within that period, and he will be unlikely to avoid a lengthy term. On this re-exercise of discretion, I would allow the application and the appeal, set aside the order made 12 October 2005 activating eight months of the suspended sentences, and order instead that Mr Muller be sentenced to imprisonment which expires on 11 November 2005.

[58] **ATKINSON J**: I have had the advantage of reading the reasons for judgment of Williams JA and of Jerrard JA. I agree with the order proposed by Jerrard JA and with his reasons except in one respect and should state briefly my reasons.

[59] This is a most unusual case. It shows the benefit to the community of orders made under the *Drug Rehabilitation (Court Diversion) Act* 2000 (Qld). Had such an order not been made, there seems little reason to doubt that the applicant would have continued to commit offences with the same relentless persistence that he demonstrated prior to the making of that order on 22 June 2004. He has not offended since 10 August 2004 – the longest period of his adult life when he has not offended whilst not in custody. Not surprisingly that has coincided with the time in which he has been drug-free, as monitored by fortnightly urine testing. His life is almost a text book case of the direct link between illegal drug usage and addiction

and criminal offending and the difficulties and set backs faced by those who attempt to rehabilitate themselves.

[60] There is no doubt that the community has benefited by the cessation in his criminal activity. So has the applicant. He now has a job, a partner and has purchased a house. He is living a stable, productive life. Unfortunately returning him to custody for breaches committed in late 2003 and early 2004 of a suspended sentence imposed in August 2002, is likely to put all that in jeopardy.

[61] He cannot continue in employment if he is in prison and he will once again be exposed to all the stresses and temptations of a custodial environment. Those are the factors which lead me to the conclusion that it would indeed be unjust, both to the community and to the applicant, in these most unusual circumstances, to require the applicant to serve all or any of the sentence of imprisonment that was imposed upon him in 2002.

[62] I agree for the reasons given by Jerrard JA that a court acting under s 147 is dealing with a person for breach of a sentence that has already been imposed, albeit suspended in whole or in part. This has the unfortunate effect that the custodial and non-custodial options available to a sentencing judge such as recommendations of post-prison community based release and intensive corrections orders are not available even where these would be the most suitable orders.

[63] The only orders that can be made are set out in s 147(1) that is the court may:

> "(a) order –
>
> (i) that the operational period be extended for not longer than 1 year; or
>
> (ii) if the operational period has expired when the court is dealing with the offender –
>
> (A) that the offender's term of imprisonment be further suspended; and
>
> (B) that the offender be subject to a further stated operational period of not longer than 1 year during which the offender must not commit another offence punishable by imprisonment if the offender is to avoid being dealt with under section 146 for the suspended imprisonment; or
>
> (b) order the offender to serve the whole of the suspended imprisonment; or
>
> (c) order the offender to serve the part of the suspended imprisonment that the court orders."

[64] I agree with Jerrard JA that the ordinary canons of statutory construction oblige this Court to construe s 147(1)(a)(i) to mean that a court can, in appropriate circumstances, extend the operational period during which the offender must not commit another offence punishable by imprisonment, by a further period of no more than 12 months even where the original sentence imposed was suspended with a five year operational period. There is no limitation imposed by statute to support the respondent's submission that this can not be done if the sentence imposed under s 144(1) was suspended with a five year operational period, which is the limit of the court's power with regard to the length of the period of suspension under s

144(6)(b) when the court is sentencing the offender. The only limitation on the time that an operational period can be extended when a court is dealing with an offender under s 147 for breach of a suspended sentence is that it can be for no more than 1 year on any occasion on which the court is acting in accordance with the powers given by s 147. The judge who dealt with the applicant was in error in holding that this alternative was not available to him.

[65] In view of the fact that it was not argued and is not necessary for the disposition of this appeal, I am not prepared to decide whether or not this may give rise, in another case, to the potential for a legislative hiatus discussed by Williams and Jerrard JJA in their reasons.

[66] In the circumstances, I agree with Jerrard JA that on a re-exercise of the power under s 147(1) to deal with the applicant, particularly in light of the strongly stated rehabilitative injunction found in s 147(3)(a)(v), the court should order that he should serve that part of the suspended period which expires on the day on which this judgment is handed down.