SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pye* [2010] QCA 184
PARTIES:	**R** **v** **PYE, Damon Harley** (applicant/appellant)
FILE NO/S:	CA No 148 of 2010 DC No 661 of 2010 DC No 550 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Orders delivered ex tempore on 21 July 2010 Reasons delivered on 23 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2010
JUDGES:	Muir and Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 21 July 2010** **1. Application for leave to appeal against sentence granted;** **2. Appeal allowed;** **3. Order of the District Court of 22 June 2010 set aside;** **4. The applicant is re-sentenced to 6 months imprisonment suspended from 21 July 2010, with an operational period of 18 months;** **5. The period of 22 June 2010 to 21 July 2010 is declared as time served under the sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant was convicted of one count of common assault and sentenced to nine months imprisonment to be served as an intensive correction order – where the applicant was charged with contravening the intensive correction order – where the learned sentencing judge was satisfied that the applicant contravened the intensive correction order by failing to report to a corrective services officer on 17 September 2008 – where the sentencing judge ordered under s 127 *Penalties and Sentences Act* 1992 (Qld) that the applicant be committed to

prison for the unexpired portion of the term and fixed a parole eligibility date at 20 September 2010 – where the applicant contended that the sentence was manifestly excessive and that the judge had erred in calculating the unexpired portion of the intensive correction order – where the sentencing judge was faced with incomplete and contradictory evidence on the applicant's compliance with the intensive correction order – whether the nature and extent of compliance with the intensive correction order after the 17 September 2008 was relevant to the exercise of sentencing discretion – whether the confusion in the evidence led the sentencing judge to overstate the applicant's default – whether in all the circumstances the sentencing discretion should be exercised afresh

Penalties and Sentences Act 1992 (Qld), s 123(1), s 126(4), s 126(6), s 127

COUNSEL: The applicant/appellant appeared on his own behalf
M B Lehane for the respondent

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

[1] **MUIR JA:** I agree with the reasons of Fraser JA.

[2] **FRASER JA:** On 21 July 2010 the Court granted the applicant's application for leave to appeal against sentence, allowed the appeal, set aside the sentence imposed in the District Court, re-sentenced the applicant to six months' imprisonment, and ordered that the balance of the term after the applicant had served the period in custody between 22 June 2010 and 21 July 2010 be suspended for an operational period of 18 months. The Court declared that the time spent by the applicant in custody between was time served under that sentence. I concurred in those orders for the following reasons.

[3] On 2 July 2008 the applicant was convicted of one count of common assault. It was ordered that he be imprisoned for nine months and that the imprisonment be served as an Intensive Correction Order. On 21 January 2009 a warrant issued for the apprehension of the applicant on the ground that he had contravened without reasonable excuse the requirement of the order that he report to and receive visits from an authorised Corrective Services officer as directed by the officer in that he failed to report to a Corrective Services officer as directed on 17 September 2008.

[4] The applicant was dealt with for that contravention on 22 June 2010. The learned sentencing judge was satisfied that the applicant had contravened the Intensive Correction Order by failing to report as directed on 17 September 2008. The sentencing judge made orders under s 127 of the *Penalties and Sentences Act* 1992 (Qld) that the applicant be committed to prison for the portion of the term of imprisonment imposed on 2 July 2008 which was unexpired on 17 September 2008 (six and a half months) and fixed the applicant's parole release date as 20 September 2010 (after two months and 28 days).

[5] The applicant sought leave to appeal against that sentence on the ground that it was manifestly excessive. In his written outline of submissions he also contended that the sentencing judge erred in calculating "the remaining portion of the ICO".

[6] The applicant committed the common assault offence on 31 October 2006. He went to a hairdressing salon owned by the complainant who had looked after the applicant's wife's hair incompetently. The applicant had first telephoned the complainant at the salon and threatened to kill him. The applicant then went to the salon and threatened to bash the complainant and burn his salon down. When the complainant walked towards the applicant holding a pair of scissors the applicant hit the complainant with an EFTPOS machine. The complainant sustained minor injuries. The judge who sentenced the applicant on that occasion took into account in the applicant's favour that he had cooperated in the administration of justice by pleading guilty, albeit that the applicant had unsuccessfully applied to set aside that plea. The judge referred also to the applicant's employment as a crane operator, regular drug testing which confirmed that he was free of drugs, that the applicant was married, and that he had bought his own house.

[7] The judge also took the applicant's criminal record into account. The applicant was 31 years of age when the Intensive Correction Order was imposed. When he was 18 years old he committed an armed robbery in 1998 for which he was subsequently sentenced in New South Wales in 1999 to five years penal servitude with a minimum term of three years. In that offence the applicant and another person went to a house with a pistol and knife and committed a robbery. The applicant was released from that imprisonment in June 2004. He committed the common assault offence a little more than two years later. Subsequently, in May 2007, the applicant was guilty of obstructing a police officer who had come to his house in response to an unjustified complaint about domestic violence. He was sentenced for that offence in September 2007. No conviction was recorded and the applicant was given a small fine.

[8] The terms of the Intensive Correction Order were explained to the applicant and he agreed that he would comply with the order. The judge informed the applicant that if he breached any term or condition of the order he would come back before his Honour or another judge and serve the balance of the period in prison.

[9] According to a Corrective Services court report dated 20 January 2009 the applicant failed to comply with the terms of the Intensive Correction Order in many respects. The report noted that on the first occasion upon which the applicant reported to the parole officer on 3 July 2008 it was apparent that the applicant considered that the requirements of the order were onerous and unreasonable. He asserted that employment and travel related issues made it difficult for him to comply with the reporting requirements and the community service component of his order. In an attempt to fit in with the applicant's employment requirements he was assigned to a Sunday work project to commence on Sunday 24 August 2008, but he failed to attend. The report stated that the applicant performed community service on only two occasions, 14 October 2008 and 19 October 2008. However, according to a "community service signature card" which the applicant's counsel tendered in the sentence hearing, the applicant did not attend community service on either of those dates, he did attend on 14 September 2008 for a total period of seven hours, and he did not attend on any of the other twelve dates for community service between 24 August and 16 November 2008. The report stated that the applicant failed to

report to the authorised Corrective Services officer as directed on 17 September 2008. The special condition of the Intensive Correction Order that the applicant submit to an anger management program as directed was said to remain unfulfilled because of the applicant's unsatisfactory responses to supervision. The report stated that the applicant moved his residence to New South Wales and failed to disclose his New South Wales address, contrary to conditions of the order. (The applicant accepted that he lived in northern New South Wales but he denied that he had not disclosed his address). Contravention proceedings were deferred because the applicant had told his supervising officer that he intended to appeal his sentence or apply for revocation of the Intensive Correction Order, but he did not do so.

[10] The sentencing judge observed that the applicant had essentially turned his back on the Intensive Correction Order almost straight away, that his compliance with the regular community service requirements was "almost nonexistent", that according to the report he attended community service only on 14 September 2008, and that he failed on numerous occasions to report to Departmental staff as required. His Honour noted that the original offence of common assault was one which frequently did not attract a sentence of imprisonment although it was more likely to do so where, as in this case, the offender had a prior history of violence. His Honour also took into account the applicant's age, that he was in a stable de facto relationship, and that his partner had a number of health problems, particularly including diabetes and a degenerative disc in her spine, for which the applicant provided assistance when he was not working. The sentencing judge took into account that the applicant was a hard worker, working 70 hours a week, who had financial obligations. However the Department had organised the community service to fit in with the applicant's remunerative work. His Honour remarked that although every case must depend upon its own circumstances, the facts of this case were that "having obtained the benefit of such an order, you did, as I perceive it, virtually nothing to comply with it, certainly, very little."

[11] The applicant accepted that he had contravened the Intensive Correction Order but he argued that the sentencing judge erred in calculating the unexpired portion of the order. He contended that he had reported to the Buranda Parole office in November 2008 and that the unexpired portion of the Intensive Correction Order should have been calculated from when the warrant issued on 21 January 2009. That contention was premised upon a misunderstanding of s 127 of the *Penalties and Sentences Act* 1992 (Qld). The date the warrant issued was irrelevant. Subsection 127(1) provides that a court that, under Pt 7 of the Act, deals with the offender for the offence for which an Intensive Correction Order was made may do so by revoking the order and committing the offender to prison "for the portion of the term of imprisonment to which the offender was sentenced that was unexpired on the day the relevant offence against section 123(1) was committed." Section 123(1) provides that an offender who contravenes, without reasonable excuse, a requirement of a community based order commits an offence. The evidence justified the sentencing judge's conclusion that the applicant committed such an offence when he failed to report as directed on 17 September 2008. If the applicant complied with some other requirement of the Intensive Correction Order after that date that does not deny that s 127 empowered the sentencing judge to revoke the order and commit the offender to prison for the portion of the term of imprisonment which was unexpired on 17 September 2008.

[12] However the nature and extent of any compliance with the Intensive Correction Order after the "relevant offence" on 17 September 2008 was relevant to the discretion whether to make that or some other order. Unfortunately the sentencing judge was faced with incomplete and contradictory evidence about those matters. At the hearing of the application in this Court the respondent quite properly submitted that the Court should act upon the view that the evidence as a whole established that the applicant had performed community service on three occasions, rather than only on the one occasion of 14 September 2008 which the sentencing judge identified. I could not accept the respondent's argument that this was immaterial. It seems unlikely that the sentencing judge would have specified a term of imprisonment commencing from the "relevant offence" date of 17 September 2008 had his Honour accepted that the applicant had also complied with his community service obligations under the Intensive Correction Order on two subsequent occasions, on 14 and 19 October 2008. In that light, and bearing in mind earlier statements in the report as to the applicant's "pattern of phoning the Brisbane South office on the day he was scheduled to report to advise that he would be unable to keep that appointment - usually for reasons of conflict with his paid employment as a crane operator", the sentencing judge may also have been misled by the statement at the end of the report that the applicant's last contact with the Probation & Parole Service was on 2 September 2008. Although the applicant's compliance was very substantially deficient, I would respectfully conclude that the confusion in the evidence led the sentencing judge to overstate the default by characterising the applicant's compliance with his community service obligations as "almost nonexistent" and his compliance with the order as "virtually nothing… certainly, very little".

[13] It therefore became necessary for this Court to exercise the sentencing discretion afresh. For the reasons I have given, rather than exercising the power in s 127 of the *Penalties and Sentences Act* 1992 (Qld) to commit the applicant to prison from 17 September 2008, the date which the Crown had identified as the date of the "relevant offence", the preferable course was to re-sentence the applicant afresh under s 126(4). Under s 126(6) the Court was obliged to have regard to the making of the Intensive Correction Order and anything done to comply with it.

[14] The applicant argued that he had engaged in hard work and successfully rehabilitated himself as a valuable member of the community, that the effect of imprisonment was there was little or no chance of his salvaging the life he had worked so hard to build, and he would almost certainly face bankruptcy as a result of his debts, which include a $300,000 mortgage, a $12,000 car loan, and $4,500 credit card debt. He provided persuasive evidence in support of his submission that his partner had been diagnosed with diabetes and required 24 hour monitoring. He provided this assistance when his extensive work commitments allowed. He contended that it was for this reason that he was forced to reside with his sister in New South Wales. He also contended that he did try to comply with the terms of his Intensive Correction Order but his commitments to his paid employment and his partner prevented him from completing his obligations under that order.

[15] None of that justified the applicant's non-compliance with his obligations. Where the applicant had substantially failed to comply with the Intensive Correction Order and avoided the consequences of his contravention for a long time it could not be accepted that he had rehabilitated himself. The great disadvantage endured by the applicant's family as a result of his imprisonment also could not be given much

weight - that was a regrettable but inevitable consequence of his offending - but he did have some unusually favourable personal circumstances which suggested that he might be a candidate for early and full rehabilitation. The applicant had been in gainful employment as a crane operator for a substantial period of time, he had demonstrated a strong work ethic, and he appeared determined and capable of supporting himself and his family. It is relevant also that he had not been convicted of any criminal offence since the making of the Intensive Correction Order.

[16] Bearing in mind those matters, the circumstances of the assault offence (particularly the apparently minor nature of the complainant's physical injuries), that the applicant committed his earlier offence many years before when he was much younger, the original imposition of the Intensive Correction Order, and the limited extent of the applicant's compliance with his obligations under it, I concluded that the appropriate sentence for the assault offence was imprisonment for six months, suspended after the period the applicant has already served in prison, for an operational period of 18 months. The Court explained to the applicant that the effect of that sentence was that if he committed any offence (which might include any traffic offence) in that 18 month operational period, in addition to any penalty imposed for that offence he could be returned to prison to serve the remaining five months of the sentence.

[17] **WHITE JA:** The Court granted the applicant's application for leave to appeal against sentence, allowed the appeal and set aside the sentence imposed in the District Court. The applicant was re-sentenced to six months imprisonment and ordered that the balance of term after he had served between 22 June 2010 and 21 July 2010 in custody be suspended for an operational period of 18 months. That time was declared as time served under the sentence. The Court reserved its reasons. I agree with the reasons of Fraser JA for making those orders.