SUPREME COURT OF QUEENSLAND

CITATION:	*Lucev v Queensland Police Service* [2012] QCA 207
PARTIES:	**LUCEV, Bradley Jamie** (applicant) **v** **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO/S:	CA No 15 of 2012 DC No 439 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	14 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	10 April 2012
JUDGES:	Fraser and White JJA, Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal granted.** **2. Appeal allowed.** **3. Set aside the orders made in the District Court.** **4. Order instead that the orders made in the Magistrates Court at Townsville on 11 July 2011 be varied by:** **(a) fixing the applicant's parole eligibility date as 16 September 2012 instead of 11 July 2013, and** **(b) setting aside the orders for restitution and 12 days imprisonment in default made with respect to the burglary offence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where applicant pleaded guilty to four offences in the Magistrates Court and sentenced to two years imprisonment for burglary with parole eligibility fixed at 11 July 2013, and restitution of $652 to the complainant or 12 days imprisonment in default of payment served concurrently; two terms of six months imprisonment for two stealing offences; and one month imprisonment for obstructing police – where sentences to be served concurrently with each other and cumulatively with current sentence – where applicant appealed sentence to District

Court on ground it was manifestly excessive – where applicant contended for a reduced sentence in the District Court and the respondent contended that the original sentence was not unreasonable – where the District Court judge allowed the appeal, set aside the sentence for burglary offence, re-sentenced the applicant to two years and six months imprisonment with parole eligibility fixed at 11 May 2012, and set aside the restitution order – where the District Court judge did not foreshadow any increase in sentence – where the applicant contended in the Court of Appeal that the District Court judge's failure to give notice of a possible increase in sentence denied the applicant an opportunity to abandon the appeal and led to a substantial injustice – whether the District Court judge's failure to give notice was a miscarriage of justice

Criminal Code 1889 (Qld), s 668E(3), s 669A
Justices Act 1886 (Qld), s 222, s 225, s 228A

Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, considered
Neal v The Queen (1982) 149 CLR 305; [1982] HCA 55, considered
R v Hardman [2001] QCA 15, considered
R v Judge Dodds [1990] 2 Qd R 80, considered
R v Kofoed [2005] QCA 438, considered
R v Walsh [2005] QCA 333, considered

COUNSEL: F Richards for the applicant
B J Merrin for the respondent

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

[1] **FRASER JA:** The main point in this application is whether, on the applicant's appeal against a sentence imposed by a Magistrate on the ground that the sentence was manifestly excessive, the District Court judge who heard the appeal denied the applicant procedural fairness by increasing the sentence without the applicant having been given any notice that such an order might be made.

[2] On 11 July 2011, the applicant was sentenced in the Magistrates Court at Townsville on his pleas of guilty to four offences committed on 9 January 2011. For a burglary offence, the applicant was sentenced to two years imprisonment, to start from 16 September 2011, the end of a term of imprisonment the applicant was then serving, with parole eligibility fixed at 11 July 2013. The applicant was ordered to pay restitution of $652 to the complainant in that offence, with no time to pay, and in default of payment 12 days' imprisonment to be served concurrently with the other terms. On two counts of stealing, and on one count of obstructing police, the applicant was sentenced to concurrent terms of six months imprisonment and one month imprisonment respectively, in each case also to be served cumulatively upon his then current sentence. The previous sentence, of three years

imprisonment with a parole release date on 16 March 2010, had been imposed on 16 September 2008 for burglary and other offences.

[3] Pursuant to s 222 of the *Justices Act* 1886, the applicant appealed to the District Court against the sentences imposed on 11 July 2011 on the ground that they were manifestly excessive. The right of appeal created by s 222(1) is conferred upon "a person [who] feels aggrieved as complainant, defendant or otherwise…" by the order. Section 222(2) sets out the following "exceptions":

> "(a) a person may not appeal under this section against a conviction or order made in a summary way under the Criminal Code, section 651;
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> (b) if the order the subject of the proposed appeal is an order of justices dealing summarily with an indictable offence, a complainant aggrieved by the decision may appeal under this section only against sentence or an order for costs;
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> (c) if a defendant pleads guilty or admits the truth of a complaint, a person may only appeal under this section on the sole ground that a fine, penalty, forfeiture or punishment was excessive or inadequate."

[4] Section 225(1) empowers the judge, on a hearing of the appeal, to "…confirm, set aside or vary the appealed order or make any other order in the matter the judge considers just." Section 225(3) provides that "[f]or subsection (1), the judge may exercise any power that could have been exercised by whoever made the order appealed against."

[5] In the District Court, the respondent conceded, and the judge acted on the concession, that the Magistrate's reasons were deficient because they did not explain why the parole eligibility date was fixed beyond the mid point of the two year cumulative term for the burglary offence. That concession was made even though that deferred parole eligibility date seems to have reflected a qualified acceptance of the submission by the applicant's counsel to the Magistrate that, because the applicant would not benefit from early parole eligibility because of an outstanding charge of causing grievous bodily harm, the applicant's cooperation and pleas of guilty should be recognised by reducing the term of the effective head sentence and setting parole eligibility at the end of the imprisonment. Since the respondent did not seek to withdraw the concession in this application and neither party challenged the District Court judge's decision to act upon that concession, it is not appropriate to revisit those issues.

[6] Counsel for the applicant in the District Court sought a sentence in the order of six to 12 months, cumulatively upon the existing sentence, with parole eligibility fixed upon the last day of the sentence. In opposition to the appeal, the respondent submitted that the appropriate sentence of imprisonment for the burglary offence extended to a term of six or seven years (the respondent acknowledged that the Magistrate's powers did not extend beyond the imposition of a maximum penalty of three years imprisonment) but it was not submitted for the respondent that the judge should impose a more severe sentence than the two years imprisonment imposed by the Magistrate. Rather, the respondent submitted that the original sentence was not an unreasonable outcome. Nor did the judge foreshadow any increase in the sentence.

[7] The judge allowed the appeal, set aside the sentence for the burglary offence, re-sentenced the applicant to a cumulative term of two years and six months imprisonment, and fixed the parole eligibility date at 11 May 2012. The order for restitution was also set aside. Thus, a result of the applicant's appeal was that the length of his sentence of imprisonment was increased by six months. Whilst an earlier parole eligibility date was fixed and the restitution order was set aside, the respondent did not contest the applicant's contention that the overall effect was to give him a more severe sentence. That was the consequence of the increase of six months in the term, notwithstanding the other variations. In relation to the restitution order, the default provision for 12 days concurrent imprisonment was relatively insignificant in the context of the two year term of imprisonment. Any benefit for the applicant in an earlier parole eligibility date may also have been rather more theoretical than real, in light of the accepted submission to the Magistrate that the applicant would not benefit from early parole eligibility.

[8] The applicant has now applied pursuant to s 118 of the *District Court of Queensland Act* 1967 for leave to appeal against the sentence imposed in the District Court. A necessary extension of time was granted by the Court on an earlier occasion. The application for leave to appeal states that the District Court judge "…failed to consider *Neal v The Queen* [1982] [sic] 149 CLR 305, when he increased the original head sentence", "[t]he Applicant was given no notice that the sentence was to be increased and afforded no opportunity to abandon the appeal", and "[t]he failure had led to a substantial injustice". The argument for the applicant was put in a number of different ways, but in essence it was that the applicant was denied procedural fairness because the length of the term of imprisonment imposed by the Magistrate was increased by the District Court judge when no such order was sought by the respondent and no notice was given to the applicant that such an order might be made. The reply to this argument in the respondent's outline of submissions, which was not vigorously pressed in oral submissions, was that the applicant's argument misconstrued the High Court's decision in *Neal v The Queen*.

[9] In *Neal v The Queen*, the Court of Criminal Appeal refused a convicted person's application for leave to appeal against a sentence of imprisonment for two months, except insofar as the court acted under s 668E(3) of the *Criminal Code* (Qld) by quashing the sentencing and substituting a sentence of imprisonment of six months. Before making those orders the court had intimated to the applicant's counsel (the applicant himself was not present at the hearing) that the court was considering using its power to increase the sentence. Section 668E(3) provided that on an appeal against sentence by a convicted person the court "if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

[10] The High Court set aside the order of the Court of Criminal Appeal and ordered that the application to that court be refused. Gibbs CJ pointed out that the power conferred by s 668E(3) was only exercisable on appeal, that is, after an application for leave to appeal, which was necessary under s 668D of the *Code*, had been granted.[1] The effect of the *Criminal Practice Rules of 1900* was that an applicant who feared as a result of the Court's observations that the sentence might be increased on an appeal for which leave was granted, was entitled to abandon the appeal before it had commenced, thereby avoiding the prospect of any increased

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1 (1982) 149 CLR 305 at 307.

sentence.[2] Gibbs CJ concluded that there should be a formal grant of leave to appeal where the Court proposed to avail itself of the power given by s 668E(3) to increase a sentence, because an applicant was not entitled to be present on the hearing of an application for leave to appeal but, once leave was granted, was entitled to be present on the hearing of the appeal (except where it was on a ground involving a question of law alone: s 671D), and an appellant was entitled to abandon the appeal once leave was granted.[3] The appeal was allowed because the Court of Criminal Appeal had increased the sentence without first granting leave to appeal and allowing the appellant the opportunity of abandoning his proposed appeal. On that procedural point, Wilson J agreed with Gibbs CJ's reasons, and Murphy and Brennan JJ gave reasons to similar effect.

[11] The respondent's outline of submissions argued that *Neal* should be distinguished on the ground that the applicant's appeal to the District Court lay as of right under s 222 of the *Justices Act*, so that there was no requirement for any gap between the granting of leave and the final disposition of the appeal. Certainly there is no scope here for the particular procedural error found in *Neal*, but the respondent's argument does not meet the broader objection that the applicant was denied procedural fairness. In *Neal*, Gibbs CJ observed that, once the Attorney-General was given the right of appeal against sentence in s 669A of the *Criminal Code*, the continued existence of the power to impose a more severe sentence was itself surprising and "may now be regarded as redundant, except perhaps in very special cases…".[4] Murphy J, who expressed the similar view that once the Attorney-General was empowered by s 669A to appeal against sentence, the power under s 668E to increase a sentence "should be regarded as virtually obsolete",[5] concluded that natural justice required that the applicant's counsel be given an opportunity to consider or obtain instructions on whether to proceed with the appeal, after leave was granted on the basis of apparent inadequacy in the sentence.[6] Similarly, Brennan J considered that the power conferred by s 668E(3) of the Code upon the Court of Criminal Appeal of its own motion to pass a more severe sentence should be regarded as redundant except perhaps in very special cases, and then only after the Court had given an appellant full opportunity to protect what Isaacs J called "the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal (*Whittaker v The King* [(1928) 41 CLR 230 p 248])".[7] More recently, in *Lacey v Attorney-General* (Qld)[8], the plurality judgment of the High Court referred to the "exceptional character" of Crown appeals against sentence, as reflecting a "…judicial concern that criminal statutes should not be construed so as to facilitate the erosion of common law protection against double jeopardy".

[12] By analogy with that reasoning, the power of the District Court under s 225 of the *Justices Act* to impose a more severe sentence on an appeal by a convicted person should be regarded as exceptional, given that a complainant who wishes to advocate for a more severe sentence is given a right to seek such a sentence on appeal. Section 228A of the *Justices Act* 1886 provides that "[a]n appellant may discontinue an appeal before it is heard by filing a notice in the approved form with the relevant

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2 (1982) 149 CLR 305 at 308.
3 (1982) 149 CLR 305 at 308.
4 (1982) 149 CLR 305 at 308.
5 (1982) 149 CLR 305 at 311.
6 (1982) 149 CLR 305 at 310.
7 (1982) 149 CLR 305 at 322.
8 (2011) 242 CLR 573 at [16]-[19] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

registrar." It seems to me that this provision empowers an appellant to discontinue an appeal at any time before the conclusion of the hearing. If the exceptional power to increase a sentence upon an appeal by a defendant against the severity of the sentence is to be exercised, the appellant, whose interests might be adversely affected by the exercise of the power, must first be given proper notice of that prospect and a full opportunity to be heard in opposition to the exercise of the power or, if the appellant prefers, to discontinue the appeal. No such notice or opportunity was given. In my respectful opinion, the applicant was thereby denied procedural fairness in the District Court. This Court must therefore proceed on the footing that the applicant is entitled to have the orders made in the District Court set aside and for the proper orders on the appeal to that Court to be considered afresh.

[13] So far I have assumed that, on an appeal by a complainant against sentence under s 222 of the *Justices Act* 1886 on the ground that the sentence is manifestly excessive, the powers of the District Court judge hearing the appeal comprehend an order which has the effect of increasing the severity of the sentence. Whether that assumption is correct was the subject of supplementary written submissions filed by leave. Neither party was able to find any authority directly upon point. For the applicant it was submitted that, since the legislation specifically provides for an appeal by the complainant against the inadequacy of punishment, s 225 does not empower a judge to increase the punishment in the absence of such an appeal. The applicant, invoking the principle of statutory interpretation that Parliament is presumed not to intend to infringe certain common law rights,[9] submitted that because of the profoundly adverse impact of such a power upon the interests of a defendant who appealed against the severity of the sentence, the power should be found only if expressed in very clear terms, and it would be expected that its use would be made conditional upon meeting the requirements of natural justice.

[14] The respondent submitted that the power under s 225(1) to "confirm, set aside or vary the appealed order or make any other order in the matter the judge considers just" confers a power to the same extent as the power conferred upon the Court of Appeal by s 668E(3) of the *Code* by the words "if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor". The respondent referred to the legislative history. Appeals of the present kind were originally brought to the Court of Criminal Appeal under s 673 of the *Code*.[10] On such appeals, that Court could exercise the power under s 668E(3) to increase a sentence on a convicted person's appeal once leave to appeal was granted under s 668D(1)(c). Section 673 was repealed on 1 August 1997. It was submitted that the second reading speech for the repealing Act (Act No 38 of 1997) revealed that the legislative intention was that all appeals from summary convictions should be heard by the District Court, with the prospect of a further appeal by leave under s 118 of the *District Court Act* 1967, but there was no indication that the powers of the District Court on an appeal under s 222 were to be more restricted than the former power of the Court of Criminal Appeal under s 668E(3). The respondent emphasised the words in s 225(1) "vary the appealed order or make any other order in the matter the judge considers just" and the amplification in s 225(3) that "[f]or subsection (1), the judge may exercise any power that could have been exercised

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9 The applicant cited Pearce and Geddes, *Statutory Interpretation in Australia*, 4th Edition, 1996, Ch 5.

10 See *Ross v The Queen* (1979) 141 CLR 432.

by whoever made the order appealed against". The respondent also referred to *R v Judge Dodds*.[11]

[15] *R v Judge Dodds* involved a very different issue. The legislative history upon which the respondent relied also does not seem to support its argument. It was not submitted that the extrinsic material included any indication one way or the other whether the powers of a District Court judge hearing an appeal under s 222 were to be as broad as the powers previously exercised by the Court of Criminal Appeal on appeals under s 668E(3). Furthermore, whilst ss 225(1) and 225(3) are expressed in broad and general terms such as literally encompass a power to increase a sentence on an appeal by a defendant against the severity of the sentence, those provisions may be contrasted with the specific language of s 668E(3), which was more clearly designed to confer power to increase sentences on convicted persons' appeals against sentence.

[16] I mentioned earlier that in *Lacey v Attorney-General (Qld)*[12] the plurality judgment of the High Court referred to the exceptional character of Crown appeals against sentence. In the same passage of the reasons, their Honours referred also to the interpretative principles upon which the applicant relies, namely, the "…wider resistance to the construction of statutes, absent clear language, so as to infringe upon fundamental common law principles, rights and freedoms", and the associated principle that general statutory provisions should not ordinarily be construed as conferring prosecution rights of appeal against sentence in the absence of "clear language".

[17] Weight might also be given to the fact that s 222 confers a variety of rights of appeal, including appeals against sentence both by the defendant and by the complainant, in the first case upon the ground that the sentence is excessive and in the second case on the ground that the sentence is inadequate. The appellant must file a notice of appeal in a District Court Registry in the relevant district (s 222(3)), the notice must state the grounds of the appeal (s 222(8)(a)), and provision is made for the notice of appeal to be given to the respondent within a specified time (ss 222D(1) and 222D(2)). These provisions are consistent with the view that the issue in an appeal by a defendant against sentence is defined by the ground stated in the notice of appeal, relevantly, whether the sentence is excessive. In this context, the absence of any provision requiring the respondent to give notice of an intention to seek an order for a more severe sentence makes it unlikely that the legislative purpose extending to authorising the imposition of a more severe sentence on appeal. The breadth and generality of the language used in ss 225(1) and 225(3) might instead be attributable merely to the circumstance that those provisions apply in relation to a broad range of appeals.

[18] With those considerations in mind, it is distinctly arguable that s 225 does not confer power upon a District Court judge hearing an appeal by a defendant against the severity of a sentence to increase the severity of the sentence. However, I refrain from expressing a concluded view. It is preferable that this issue be left for decision in a case in which it is necessary to decide it and in which the point is squarely raised for decision. In this case the application does not encompass the point, and the appeal must in any event be allowed upon the ground expressed in the application, that the applicant was subjected to a substantial injustice because he was given no notice that his sentence was to be increased.

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11 [1990] 2 Qd R 80 per Connolly J at 82.

12 (2011) 242 CLR 573 at [16]-[19] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[19] The remaining question is what orders should now be made.

[20] The applicant was 34 years old at the time of his offending and he was 35 years of age when sentenced. He had a very lengthy and relevant criminal history, which included many offences of burglary or similar offences, and numerous sentences of actual imprisonment. Most recently, he was sentenced on 16 September 2008 to three years imprisonment with a parole release date after 18 months for a burglary offence he committed on 19 August 2008. He committed the present offences whilst on parole. The applicant and two co-offenders went to the complainant's residence, the applicant incorrectly believing that a sexual offender resided there. The applicant and his co-offenders yelled threats to kick in the door if they were not let inside. The complainant was too scared to approach them. He, his partner, and his parents (who were visiting at the time) fled out a different door. The applicant and his co-offenders kicked in the door. The co-offenders entered and stole property whilst the applicant remained outside on watch. The co-offenders took some property including some backpacks, which belonged to the complainant and other property belonging to the complainant's partner. The applicant also stole some shoes on the same day from a complainant who occupied the residence next door. The police were called and the applicant was arrested after a short chase.

[21] The complainant and his family were no doubt fearful for their safety when they left the complainant's residence. However, unlike many of the cases which were cited in this application, the complainant and his family having prudently retreated, the applicant did not use any personal violence or cause any injuries to any person.

[22] The applicant acknowledged that a term of imprisonment should be imposed cumulatively upon the pre-existing imprisonment, with eligibility for parole to be deferred until after the commencement of the added term. It was submitted for the applicant that the appropriate sentence was between 18 months and two years imprisonment, cumulative upon the pre-existing sentence, with a parole eligibility date set at between one third and one half of the term imposed, the later date perhaps being appropriate in light of the applicant's lengthy criminal history. *R v Kofoed* [2005] QCA 438 was submitted to be of most assistance. That 36 year old applicant with an extensive criminal history, including convictions for burglary and offences of violence, entered his employer's house over her objection. He poked her with his finger, was extremely aggressive, made offensive and threatening comments, and repeated misconduct later in the same day, when he also assaulted the complainant. He harassed the complainant regularly over the succeeding nine month period, including one serious incident of "road misconduct". He entered a late plea after the matter had been set for trial. An effective sentence of two years imprisonment suspended after six months for an operational period of three years was not disturbed on appeal. There is no indication in the judgments that the sentence was considered to be at the high end of the range of permissible sentences.

[23] The respondent cited two decisions concerning burglary offences in which the offender was not found to have engaged in any personal violence. The applicant in *R v Hardman* [2001] QCA 15 was sentenced to three and a half years imprisonment, with a recommendation for consideration for parole after 16 months, for burglary by breaking, in the night, with threats of violence whilst armed and in company. That 24 year old man went in company with a co-offender in the middle of the night to the complainant's house, where they kicked in the front door and the co-offender,

urged on by the applicant, threatened to kill the complainant. The complainant left through the back door when the co-offender entered the house. The applicant and the co-offender left. The applicant admitted to possessing a knife and having wanted to kill the complainant, with whom he had no prior acquaintance. Whilst on bail for that offence, the applicant subsequently unlawfully assaulted his neighbour, unlawfully damaged some property of his neighbour, and assaulted a police officer who was endeavouring to arrest him for the wilful damage offence. The applicant had a relevant criminal history for offences of violence. Mullins J held that the authorities supported a range in which three and a half years imprisonment was not the maximum, even allowing for the fact that the complainant was not assaulted. Her Honour considered that the head sentence was within range and not at the absolute end of appropriate range taking into account all the circumstances, and it might have reflected some allowance for the applicant's co-operation and guilty plea, which was also reflected in the early release on parole. The President and Thomas JA considered that, when the applicant's prior convictions and other offending were taken into account, the sentence was not manifestly excessive. Thomas JA expressed the view that the sentence was at the higher end of what could be justified.

[24] The applicant in *R v Walsh* [2005] QCA 333 was convicted after a trial of one count of burglary and stealing. He, in company with others, entered a dwelling house and stole property to the value of approximately $16,000. One of the co-offenders assaulted the complainant, but the applicant was not convicted of that offence. The applicant was 31 years old at the time of the offence and 32 years old when sentenced. Keane JA, with whose reasons Jerrard JA and Fryberg J agreed in this respect, referred to the applicant's lengthy criminal history involving offences of dishonesty over 14 years and to him having been sentenced to imprisonment on four separate occasions. When he committed the offences he was subject to a suspended term of imprisonment for drug-related offences. Keane JA expressed the views that it was impossible not to agree with the sentencing judge both that there was a need for personal deterrence having regard to the applicant's criminal history and as to the sentence of two years imprisonment which was imposed.

[25] The applicant's sentence on the burglary offence should reflect his criminality in each of his offences, that he was not deterred from offending by various orders, including sentences of imprisonment, imposed on previous occasions for similar offending, and that he committed the burglary offence whilst on parole. On the other hand, some allowance must be made for the applicant's plea of guilty, although it was not an early plea. The police prosecutor informed the Magistrate that the applicant decided to change his plea to a plea of guilty only in the week before he was sentenced, after a full brief had been prepared and the witnesses had been arranged to come to Court. It is also necessary to bear in mind the effect of the totality of the imprisonment which results from making the additional imprisonment cumulative upon the pre-existing term.

[26] Consistently with the cited decisions, a proper sentence in these circumstances is two years imprisonment cumulative upon the pre-existing sentence, with parole eligibility on 15 September 2012 (at about the mid-point of the additional term). That sentence falls within the range contended for by the applicant. It was not suggested that such a deferral of the parole eligibility date would make this a more severe sentence than the two years and six months cumulative imprisonment, with parole eligibility on 11 May 2012, which was imposed in the District Court. I note

also that the respondent did not contend that the restitution order made in the Magistrates Court and set aside in the District Court should now be restored.

Proposed order

[27] I favour the following orders:

1. Grant the application for leave to appeal.
2. Allow the appeal.
3. Set aside the orders made in the District Court.
4. Order instead that the orders made in the Magistrates Court at Townsville on 11 July 2011 be varied by:
   (a) fixing the applicant's parole eligibility date as 16 September 2012 instead of 11 July 2013, and
   (b) setting aside the orders for restitution and 12 days imprisonment in default made with respect to the burglary offence.

[28] **WHITE JA:** I have read the reasons of Fraser JA and agree with his Honour that the applicant was denied procedural fairness in the appeal hearing in the District Court. As a consequence, the sentence imposed in the Magistrates Court must be considered. I agree with Fraser JA's reasons for varying the orders made by the magistrate and the orders which he proposes.

[29] I am grateful to his Honour for his analysis of the extent of the power conferred under s 225 of the *Justices Act* on a District Court judge hearing an appeal from the Magistrates Court. Like his Honour, I would prefer to leave final decision on this important matter until it is squarely raised and decided with the benefit of full argument.

[30] **MULLINS J**: I agree with Fraser JA.