

COURT OF APPEAL

**FRASER JA
MORRISON JA
HENRY J**

**CA No 127 of 2015
DC No 960 of 2014**

THE QUEEN

v

SHAMBAYATI, Sasan

Appellant

BRISBANE

THURSDAY, 5 MAY 2016

THE COURT: On 3 June 2015, the appellant was sentenced to eight months' imprisonment with a parole release date fixed on 3 October 2015. Consistently with that sentence, the primary judge intended that the appellant would serve four months of the sentence in prison and then the next four months of the sentence on parole.

On 17 June 2015, the appellant appealed against his conviction and sentence. On 13 August 2015, upon the appellant's application of 4 August 2015, he was released on appeal bail by a judge of the trial division. By that time, the appellant had served all but one month and 20 days in prison out of the four months required by his sentence. The appeal came on for hearing on 3 November 2015, after the parole release date of 3 October 2015.

On 19 April 2016, the court dismissed the appeal and refused the application for leave to appeal against sentence. On 21 April 2016, the respondent applied for a warrant for the arrest of the

respondent with a view to the appellant serving a further period of one month and 20 days, calculated as 51 days, in prison.

The appellant has applied for orders which are designed to keep him at liberty pending the determination of a proposed application for special leave to appeal and, if special leave is granted, the determination of an appeal to the High Court against the dismissal of his appeal to this court.

A preliminary question has been agitated concerning the court's power to set aside the parole release date fixed by the primary judge and fix a new parole release date. Upon that question, see *R v Macdonald* [2008] QCA 384, and *R v Ball* [2012] QCA 51. In the way in which the matter was argued, it is not necessary for the court to decide that question.

Ultimately, the question is whether or not a warrant should issue, notwithstanding that the parole release date is now in the past. In my opinion, it should. The statutory purpose of authorising and requiring, in specified circumstances, sentencing judges to fix a parole release date does not afford any significance to the date itself. Rather, the fixing of such date is merely a mechanism which is intended to give effect to the sentencing judge's decision as to the just and appropriate term of imprisonment and periods to be served by the prisoner in custody and thereafter on parole in the community. Both that statutory purpose and the statutory purpose in providing for appeal bail would be defeated if the grant of appeal bail resulted in the prisoner not being obliged to serve the whole of the period of imprisonment reflected in the sentence, merely because the appeal could not come on for hearing until after a parole release date.

The relevant statutory provisions are, I think, open to a construction which gives effect to the statutory purposes. Section 199 of the *Corrective Services Act 2006* provides that, subject to an exception which is presently inapplicable:

“The chief executive must issue a court ordered parole order for a prisoner in accordance with the date fixed for the prisoner's release on parole under the *Penalties and Sentences Act 1992*, part 9, division 3.”

It is notable that s 199 does not oblige the chief executive to issue a parole order which specifies the parole release date fixed by the court “as the date for the release on parole” of the prisoner.

Rather, the obligation is to issue a parole order “in accordance with” that date. Where, under s 671G(3) of the *Code* or s 158 of the *Penalties and Sentences Act 1992* (Qld), the term of imprisonment ceases to run as a result of the grant of appeal bail, for the purposes of the power conferred upon the chief executive by s 199, it may be regarded as being “in accordance with the date fixed for the prisoner’s release on parole” for the chief executive to specify as the parole date under a parole order such date as will result in the prisoner serving in custody and thereafter on parole the periods required by the sentence.

The statutory scheme provides for the release of a prisoner on parole only pursuant to a parole release order issued by the chief executive. Since, upon the court’s construction of s 199 the chief executive was not obliged to issue such an order once appeal bail was granted to the appellant, and presumably has not done so, the appellant is not presently entitled to be at liberty. Accordingly, a warrant should issue on appropriate conditions.

In the event of any dispute about the appellant’s entitlement to liberty, and in particular any dispute about the appropriate date which is the date “in accordance with” the parole release date fixed by the primary judge, such a dispute could be resolved either by a process of judicial review or by declaratory relief.

It is necessary then to turn to the question concerning a deferral of execution of the warrant pending the proposed application for special leave to appeal to the High Court. The respondent ultimately did not oppose deferral of the execution of the warrant for an appropriate period upon appropriate conditions pending the determination of an application for special leave to appeal. That stance no doubt recognised the fact that the remaining period of imprisonment to be served by the appellant is very short, being only some 51 days.

The prospects of a successful application for special leave to appeal to the High Court could not be regarded as necessarily being so limited as to justify not deferring the execution of the warrant in these circumstances. Whether or not any further deferral or stay should be granted after a determination of a special leave application, assuming that to be successful, would presumably be a matter to be agitated in the High Court.

In the circumstances, the appropriate orders are as follows:

- (1) Order that a bench warrant issue in respect of the appellant, but that it lie in the registry until the date upon which the proposed application for special leave to appeal to the High Court is either determined, withdrawn or not proceeded with, provided that:
 - (a) execution of the warrant issued forthwith in the event that an application for special leave to appeal to the High Court is filed and served on the respondent before 5 pm on 20 May 2016;
 - (b) execution of the warrant issued forthwith if the appellant fails to comply with any of the following conditions:
 - (i) by 4 pm on 12 May 2016, the appellant must surrender his passport to the Court of Appeal Registry.
 - (ii) The appellant must reside at 2 Midholm Street, Sunnybank Hills in the State of Queensland unless he receives the prior written consent of the Director of Public Prosecutions to reside elsewhere.
 - (iii) The appellant must report each Thursday, commencing 12 May 2016, between the hours of 8 am and 6 pm, to the officer in charge of the Upper Mount Gravatt Police Station unless he receives the prior written consent of the Director of Public Prosecutions to do otherwise.
 - (iv) The appellant must not contact or attempt to contact any Crown witnesses, including the complainant, either directly or indirectly while subject to this order.
 - (v) The appellant must not commit an offence while subject to this order.
 - (vi) The appellant must not depart the State of Queensland unless he receives the prior written consent of the Director of Public Prosecutions to do otherwise.
- (2) The parties have liberty to apply.