SUPREME COURT OF QUEENSLAND

CITATION:	*R v Daly* [2004] QCA 385
PARTIES:	**R** **v** **DALY, Matthew Troy** (applicant/appellant)
FILE NO/S:	CA No 218 of 2004 SC No 151 of 2004 SC No 320 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Orders made 3 September 2004 Reasons delivered 15 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2004
JUDGES:	McMurdo P, McPherson and Jerrard JJA 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 to the extent of substituting on count 2 a sentence of three years imprisonment suspended forthwith on the date of the hearing of the appeal for an operational period of three years**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – where applicant pleaded guilty to one count of possession of methylamphetamine with a circumstance of aggravation, one count of supplying methylamphetamine and various other drug related offences – where applicant sentenced to three years imprisonment suspended after 12 months for the supply of methylamphetamine, three years imprisonment with a recommendation for PPCBR after serving 12 months for the possession of methylamphetamine and lesser concurrent sentences for the other offences – where 347 days spent in pre-sentence custody declared time already served under the sentences imposed – where sentencing judge intended that the applicant be released on parole after serving 12 months of the

partially suspended sentence – where for administrative reasons recommendation for parole not capable of being given effect in the way intended - whether sentencing discretion miscarried

Penalties and Sentences Act 1992 (Qld), s 92(1)(b), s 188(1)(c)

R v Arana [2000] QCA 184, CA No 441 of 1999, 16 May 2000, considered
R v Corrigan [1994] 2 Qd R 415, considered
R v Hughes [2000] QCA 16, CA No 306 of 1999, 11 February 2000, considered
R v Hughes [1999] 1 Qd R 389, considered
R v M, ex parte Attorney-General [1999] QCA 442; [2000] 2 Qd R 543, considered
R v MacKenzie [2000] QCA 324; [2002] 1 Qd R 410, considered
R v Maxfield [2000] QCA 320; [2002] 1 Qd R 417, considered
R v Vincent, ex parte Attorney-General [2000] QCA 250; [2001] 2 Qd R 327, considered
Sysel v Dinon [2002] QCA 149; [2003] 1 Qd R 212, applied

COUNSEL: A J Moynihan for the applicant/appellant
M R Byrne for the respondent

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

[1] **McMURDO P:** Mr Daly's application for leave to appeal was heard on 3 September 2004. At the conclusion of the hearing, this Court granted the application for leave to appeal and allowed the appeal to the extent of substituting a sentence of three years imprisonment suspended forthwith with an operational period of three years for the sentence originally imposed on count 2, (three years imprisonment with a recommendation for post-prison community-based release after 12 months). The Court stated it would publish its reasons later.

[2] The relevant facts are set out in Jerrard JA's reasons for judgment so that I need only repeat those necessary to explain in short form my reasons.

[3] Mr Daly was also sentenced on count 3 to three years imprisonment suspended after 12 months for an operational period of three years and on the remaining counts, (counts 1, 4 and 5), to short concurrent terms of imprisonment of six months or less.

[4] The learned sentencing judge rightly recognised the serious aspects of the offences. There were also mitigating factors: Mr Daly's early plea of guilty and cooperation with the administration of justice, that at 23 years old he was still a young man, his unfortunate personal background and his efforts at and prospects of rehabilitation. His Honour indicated in his sentencing remarks that he intended to give effect to these mitigating factors by suspending the three year term of imprisonment after 12 months in respect of count 3 and by recommending community-based release after

serving 12 months in respect of count 2. No doubt his Honour felt that the combination of a suspended sentence with the additional support and supervision offered by community-based release was in the best interests of Mr Daly's rehabilitation. It is not contended that the combination of sentences imposed on counts 2 and 3 were unlawful: cf *R v Hughes*,[1] *R v M; ex parte Attorney-General*,[2] *R v Vincent; ex parte Attorney-General*[3] and *Sysel v Dinon.*[4] His Honour stated:

> "That does not mean that you will immediately be granted parole, necessarily at least. It may mean that you will have for some period other forms of community-based release. Those are matters within the discretion of the prison authorities. However, it does mean that I expect that what I have recommended will be implemented unless there is some serious matter that has not been brought to my attention in the course of this sentencing. If that is the position I would expect, since it is to be in the near future, that there may be grounds for an application under s 188 *Penalties & Sentences Act.* If it is not that, then really there is no reason why you should not get post-prison community-based release at the time I recommended unless you do something to blow it for yourself. That is in your own hands."

[5] At the time of the hearing of Mr Daly's application for leave to appeal, it was clear that his Honour's recommendation in respect of the sentence imposed on count 2, that Mr Daly be granted community-based release after serving 12 months of the three year sentence, would not be implemented for administrative reasons and through no fault of Mr Daly.

[6] As his Honour foreshadowed in his sentencing remarks, this application could have been brought more sensibly and expeditiously before him under s 188 *Penalties & Sentences Act* 1992 (Qld). That was not done and, instead, an application for leave to appeal was brought before this Court. In the interests of expedition and justice, the most appropriate course was then for this Court to deal with that application. In determining and imposing that sentence on count 2, his Honour acted on a mistaken premise so that the sentencing discretion miscarried. That is why the application for leave to appeal was granted, the appeal allowed and the substituted sentence imposed on count 2.

[7] **McPHERSON JA:** I agreed with Jerrard JA in allowing this appeal by substituting on count 2 a sentence of imprisonment suspended on the date of the hearing of this appeal, which was 3 September 2004. My view was and is that, as the applicant's outline submitted, "the learned sentencing Judge's unconventional imposition of concurrent terms of imprisonment, one partially suspended, and the other with a recommendation for consideration for early release" had produced a combination of orders that, in this particular case, was inconsistent or unjust.

[8] That state of affairs resulted from the fact that on count 2 the applicant was sentenced to imprisonment for three years with a recommendation for parole after serving 12 months of it; while on count 3 he was sentenced to imprisonment for three years suspended after 12 months for an operational period of three years. It

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1 [1999] 1 Qd R 389.
2 [2000] 2 Qd R 543.
3 [2001] 2 Qd R 327.
4 [2003] 1 Qd R 212.

was clearly his Honour's intention as disclosed by his sentencing remarks that the applicant should be paroled at the time he was released from prison. The problem is, however, that the applicant had already spent 347 days in pre-sentence detention, and so had to serve only another 18 days before the sentence on count 3 was due to be suspended. As, however, there was, for administrative reasons, no prospect of his parole application being considered at that date or within so short a term afterwards, his Honour's intention in making the recommendation for parole was never capable of being given effect in the way he envisaged.

[9] In these circumstances, I considered that the sentencing discretion has miscarried, and that the appeal should be allowed and the sentence varied by substituting on count 2 a sentence of imprisonment for three years also to be suspended after 12 months (or 365 days) of it had been served. Because the period of 347 days of pre-sentence detention counted towards it, the applicant was due for release before the application or appeal was heard in this Court. I leave to a different occasion and another case a consideration of whether and to what extent previous decisions of this Court concerning the consistency or inconsistency of combining various diverse sentencing options ought to be reviewed.

[10] **JERRARD JA:** On 11 June 2004 Matthew Daly pleaded guilty to one count of unlawfully having possession on 1 July 2003 of the dangerous drug cannabis sativa; one count of unlawfully having possession that same day of the dangerous drug methylamphetamine in a quantity which exceeded two grams; one count of having supplied that dangerous drug to another person on a date unknown between 20 June 2003 and 2 July 2003; two counts of having unlawfully supplied the dangerous drug cannabis sativa to another person, each such offence allegedly occurring on a date unknown between 1 June 2003 and 2 July 2003; one count of possessing property on 1 July 2003, namely one set of digital scales, reasonably suspected of having been used in connection with the commission of an offence defined in Part II of the *Drugs Misuse Act* 1986; and one count of unlawfully possessing on 1 July 2003 a thing, namely a pipe, that he had used in connection with the smoking of a dangerous drug, namely methylamphetamine.

The sentences

[11] The learned sentencing judge ordered that he be imprisoned for one month for possessing the cannabis (count 1); imprisoned for three years for possessing the methylamphetamine (count 2), and the learned judge recommended that Mr Daly be eligible for post prison community based release after he had served 12 months of that period; imprisoned for three years for unlawfully supplying the methylamphetamine to another (count 3), such imprisonment to be suspended after Mr Daly had served 12 months, with an operational period of three years; imprisoned for six months on each count of supplying cannabis (counts 4 and 5); and imprisoned for three months for possession of the digital scales and the pipe. All sentences of imprisonment were ordered to be served concurrently; and the learned judge declared that 347 days of pre-sentence custody was time already served under those sentences.

[12] Mr Daly has applied for leave to appeal those sentences, arguing that the sentencing judge's "unconventional imposition of concurrent terms of imprisonment, one partially suspended and the other with a recommendation for consideration for early release" was inconsistent or unjust in its result for the applicant.

The offences

[13] The circumstances of the offences were as follows. Police had attended on premises in Windsor on 1 July 2003, and after some police had knocked on the front door, others observed something being thrown out of an open window. On examination it proved to be a bag containing the drugs, the scales, and the pipe, the possession of which the applicant admitted by his guilty plea. After the police had entered the premises and conducted a further search, the applicant admitted ownership of the bag and its contents.

[14] The bag contained 14 clipseal plastic bags, and 13 of those each contained between .14 and .18 of a gram of methylamphetamine. The other contained nearly one gram. Altogether there was a total white powder weight of 3.109 grams, with a methylamphetamine purity of 72.7%, with a resulting calculated weight of 2.26 grams of methylamphetamine. Mr Daly told the police the methylamphetamine was his, that he was heroin dependent, and that while he had used the methylamphetamine mainly for his personal use, he had sold a bag of it for $50 within the previous week. He also admitted supplying marijuana to two other persons, whose names appeared on a list of names with sums of money found inside the bag, which list he admitted also to be his. The quantity of cannabis found in his possession was only small. His plea of guilty was a timely one.

Mr Daly's background

[15] He had an unfortunate earlier life. His parents separated when he was nine, and his siblings remained with his violent and alcoholic father. He stayed with his mother, who relocated from Adelaide to Mackay, and then placed him in a foster home when he was about 11. Some two years later he left that foster home and began living on the streets, which he did for about four years. He left school after grade 7. He eventually made contact again with his mother when he was about 18, and when she was then supporting herself by prostitution and was addicted to drugs. She introduced him to those.

[16] His prior record of convictions records his own involvement with drugs for a number of years. In November 1999 he was convicted of possession of dangerous drugs; in February 2000 of possession of utensils and pipes used in connection with the administration of dangerous drugs; in May 2000 of having supplied dangerous drugs on 30 March 2000; in July 2000 of possession of a controlled drug on 29 June 2000 and failing to take reasonable care and precautions in respect of a needle and syringe on that same date; and in November 2001 of supplying dangerous drugs, those offences being committed in May 2001. He also had a conviction in March 2003 for unauthorised dealing with shop goods.

[17] Mr Daly was sentenced to imprisonment on 5 November 2001 for those offences of supplying dangerous drugs, that being his first sentence of imprisonment actually served. Prior to that he had received suspended sentences and probation.

[18] Counsel informed the learned sentencing judge by way of submission that in 2003 and shortly before the offences for which he then stood to be sentenced Mr Daly had learnt from police that his mother had been murdered; and that extremely distressing information had resulted in Mr Daly's indulgence in excessive abuse of dangerous drugs. Prior to that he had been attempting to help his mother, and he had obtained employment for himself and had achieved a drug free status for a

period. After being taken into custody on 3 July 2000 he had undertaken some studies to improve his literacy. He had also commenced a drug rehabilitation course, not earlier available to him.

The frustrated recommendation for parole

[19] The learned sentencing judge was clearly not unmoved by all of that information, describing Mr Daly as having had a very unfortunate background, and taking into account the murder of his mother and Mr Daly's relatively youthful age (23 years old). However, the judge also observed that the methylamphetamine Mr Daly admitted possessing was obviously packaged for commercial use, had a high level of purity, and Mr Daly had a bad criminal history regarding possession of drugs. He considered Mr Daly had demonstrated some capacity to stop himself from continuing drug affected misbehaviour, and the capacity to make something out of his life, and those considerations resulted in the combination of sentences imposed. The judge declared the object of those as being that after the effluxion of 365 days from 2 July 2003 Mr Daly would have one of the two longer sentences suspended, and would be eligible for parole on the other. The learned judge observed that while Mr Daly might not immediately be granted parole, that being within the discretion of the "prison authorities" (meaning no doubt the appropriate Community Corrections Board), "I expect that what I have recommended will be implemented unless there is some serious matter that has not been brought to my attention in the course of this sentencing". The judge added that: "If it is not that, then really there is no reason why you should not get post-prison community-based release at the time I recommend unless you do something to blow it for yourself. That is in your own hands".

[20] This application was brought because Mr Daly had not received a hearing date for his application for release on parole, lodged on or about 16 June 2004. The outline of argument prepared on his behalf informs this court that the average waiting period for a hearing before the relevant Community Corrections Board is two months; and that on 12 August 2004 Mr Daly had his application returned, the Board having decided that the application could not be heard until "this appeal" (lodged on 13 July 2004) was determined. That decision was mandated by s 134(2)(b) of the *Corrective Services Act* 2000. The applicant's counsel submits that in those circumstances the moderation of the head sentence, intended by the recommendation for parole release, was illusory and futile. Mr Daly's counsel asked for this court to set aside the recommendation for parole eligibility, and to replace it with an order suspending his sentence from 3 September 2004.

Orders that can and cannot be made

[21] The first matter to consider is the appropriateness of the orders for concurrent three year terms of imprisonment, one suspended after 12 months and one accompanied by a recommendation for release on parole after 12 months. In *R v Vincent, ex parte Attorney-General* [2001] 2 Qd R 327 this court held (at 330) that a sentence of three months imprisonment entirely suspended for 12 months could properly be joined with a sentence, imposed for a separate offence, requiring the performance of 80 hours community service, holding that neither the decisions in *Craig David Hughes*[5] or *Arana*[6], nor the reported cases of *R v Hughes*[7] or *R v M, ex parte Attorney-*

5 [2000] QCA 16
6 [2000] QCA 184

General[8], were inconsistent with that conclusion. In *Vincent* this court held those decisions were all based upon the inappropriateness of concurrent orders for probation and imprisonment, held to be inappropriate in *R v Hughes* because of the impossibility for an offender of complying with the usual terms of a probation order, if imprisoned. The sentence in *R v Hughes* was one of three years probation on one count, and 2.5 years imprisonment on the other, with a recommendation for parole after six months. It would have been impossible for that offender to comply with the requirement of the probation order to report within 24 hours of the order being made to a probation office.

[22] In *R v M, ex parte Attorney-General* [2000] 2 Qd R 543 this court held that the combination of a probation order and an intensive correction order is also an error, both because s 113 of the *Penalties and Sentences Act* 1992 declares an intensive correction order to be a sentence of imprisonment, and because there is a potential in some circumstances for conflict to arise in complying simultaneously with orders in both forms[9]. In *Craig David Hughes* Thomas JA remarked, and I respectfully agree, that the result reached in *R v Hughes* and *R v M* was inconveniently restrictive, and that concurrent orders for immediately suspended sentences and probation were quite workable. The judgment in *R v Vincent* explains the acceptable consistency between an entirely suspended sentence of three months imprisonment suspended for 12 months, and an order for performance of 80 hours of community service, as resulting from the terms of s 103(2)(b) of the *Penalties and Sentences Act*, which require the ordered hours of community service to be performed "within 1 year from the making of the order or another time allowed by the court". Thus, in the example given in *Vincent*, if, prior to completing the community service, that offender committed another offence and was required by the court to serve the suspended term or part of it, there was no reason why the balance of the community service could not be performed after that offender's release.

[23] This court observed in *Vincent* that it was neither necessary nor desirable to extend the restrictive effect of *R v Hughes* into the sentencing options of community service and orders for a suspended sentence. The logic of the decision in *R v Vincent* would allow the imposition at the same time of orders for the performance of community service and for a partly suspended sentence of imprisonment, with the community service ordered to be performed after release from custody.

[24] Regarding the sentences imposed on Mr Daly, there is nothing which would prevent his complying with the terms of each order, whether or not he is released on parole. All he has to do is not re-offend. This court seems to be moving toward a re-consideration of the results in *Craig David Hughes*, *R v M*, and *Arana*, and towards a position in which the court asks merely whether two or more different sentences are necessarily incapable of all being complied with, as was the case in *R v Hughes*.

Parole recommendations generally

[25] As to the recommendation for release on parole less than 3 weeks after the date of making the order imposing the three year head sentence, a result occurring because of the 347 days already served, it would obviously be a matter for the discretionary

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7 [1999] 1 Qd R 389.
8 [2000] 2 Qd R 543.
9 At [2000] 2 Qd R 550 at [40] and 554 at [3].

judgment of the appropriate Community Corrections Board whether Mr Daly was so released. Community Corrections Boards often have information before them not available to a sentencing court which has recommended early consideration for parole. This can include information about the behaviour of the applicant when in custody on other earlier occasions, or while awaiting sentence for the offence for which parole is sought, or when in custody after that sentence was imposed. Community Corrections Boards also often have available to them reports about an applicant, prepared by informed and qualified people, which were not placed before the sentencing judge. Those sometimes include assessments made before an applicant's last occasion of release from custody, and prior to committing the offence or offences for which sentence is to be passed. The fact that other information is available to such Boards was recognised by McPherson JA and Pincus JA in their joint judgment in *R v Hughes,* where their Honours wrote:

> "… It does not follow that that recommendation will be given effect as a matter of course. There may be reasons, including the applicant's behaviour in prison, capable of leading to parole being deferred…".

[26] In *R v Maxfield* [2002] 1 Qd R 417 the majority judgment of this court noted that the earlier decision in *R v Corrigan*[10] had depended upon the view that a recommendation (for early release on parole) produced an ameliorating effect on the sentence, and thus could be regarded as a reduction of the sentence. The majority view in *Maxfield* held that if, viewed at the time of sentencing, there was a significant risk that effect would not be given to a recommendation then, where that risk existed for reasons beyond the prisoner's control, the recommendation did not in reality qualify as a reduction of sentence, contrary to the assumption of the sentencing judge. It was unnecessary in *Maxfield* for the majority to consider what should happen if a recommendation was not followed, although the possibility of judicial review was adverted to. The judgment in *Maxfield* should be understood as expressing the view that a Community Corrections Board cannot lawfully refuse to grant parole on the basis of a consideration which was fully taken into account by the sentencing court at the time it made a recommendation for release on parole.

[27] In *R v MacKenzie* [2002] 1 Qd R 410 this court held, consistent with the majority in *Maxfield*, that where a sentencing court had assumed that a recommendation for early release on parole was at least capable of being given effect to, and that assumption was an error of fact, an application could properly be bought pursuant to s 188(1)(c) of the *Penalties & Sentences Act* to reopen the sentence. The error of fact identified in *MacKenzie* occurred because the recommended non-parole period in that applicant's matters expired on 6 September 2000, and that applicant had been told on 27 September 2000 that her application for parole was refused, in part because of the delay in having her appeal disposed of, resulting in delay in participation in relevant programs and accordingly in the reduction of her classification from a medium to an open classification prisoner; and that applicant was then informed on 10 October 2000 that she remained on a medium security classification, would become open security within the next couple of weeks, but would not be further reviewed until January 2001. In *MacKenzie* this court accepted that the assumption on which sentence had been passed – that the recommendation could be, even if it might not be, given effect to – enlivened the

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[10] [1994] 2 Qd R 415.

power under s 188(1)(c); I suggest such an application would ordinarily be made to the sentencing court.

The instant appeal

[28] The same situation as that explained in *R v MacKenzie* occurs here, although this is not the appropriate court to hear a s 188 application. Mr Daly's eligible date for consideration for release on parole was 19 July 2004, but as at 10 August 2004 no hearing date had been set for his application, and there was a waiting period of at least two months. The learned sentencing judge had assumed, incorrectly, that the recommendation made would be capable of being effective irrespective of whatever the sitting arrangements or convenience of whichever Community Corrections Board had the duty to hear Mr Daly's application. Courts can avoid errors of that sort by remembering that Community Corrections Boards do not meet daily, nor sit to suit the convenience of either applicants or sentencing courts; and should by order allow a realistic period to elapse in which an application can be made and considered, after the date of sentence and before the date of recommended release.

Limits on ordering probation

[29] The judgments of this court in *R v Hughes* recognised that the express provisions of s 17(1) of the *Offenders Probation and Parole Act* 1990 (now found in s 92(1)(b) *Penalties and Sentences Act*) permit a probation order to operate concurrently with but subsequently upon a sentence of imprisonment in the circumstances specifically provided for in the section. The judgment of this court in *Sysel v Dinon* [2003] 1 Qd R 212 at 218 holds that nothing in s 92(1)(b) requires the conclusion that an offender cannot be sentenced to a term of imprisonment for each of two or more separate offences, and be subjected to concurrent but subsequent probation orders in respect of one or more of the same offences. Further there was no compelling reason why an offender sentenced to a term of imprisonment (of up to one year) for each of two offences being dealt with at the same time as a third offence could not be subjected to a term of probation in respect of the third offence without a further term of imprisonment being imposed. This is because s 92(1)(b) provides that a probation order may be made, the requirements of which do not commence until the offender is released from imprisonment.

[30] That decision expressly holds that the terms of imprisonment, and probation order, need not be imposed in respect of the same offence, for s 92(1)(b) to apply. This court was not asked to reconsider that ruling. It necessarily follows that for valid sentences of imprisonment and probation to be imposed at the same time, the maximum term of imprisonment that can be ordered is 12 months. Applying that decision here means that the prohibition in s 92(1)(b)(i) against ordering probation where an offender is sentenced to imprisonment for longer than 12 months prevents an order now being made that would achieve the object that the learned sentencing judge intended, namely an order for 12 months imprisonment on count 2, to be followed by three years probation. The judgment in *Sysel v Dinon* prevents that order, because Mr Daly was sentenced to three years imprisonment on count 3, and even though that was for a different offence, the fact of that sentence being imposed means s 92(1)(b) excludes an order for a probation term for another offence.

[31] I respectfully consider that the objects which the learned judge sought to achieve by the sentences imposed, namely the deterrent effect of a suspended sentence and the

beneficial effect of counselling for the applicant while on parole, were sensible, but have been frustrated by the delay the judge did not foresee. Mr Daly has therefore been held in custody longer than the judge expected, and not because of facts about Mr Daly known to the Corrections Board and not by the judge. In those circumstances this court concluded the learned judge's incorrect assumption has resulted in some other sentence being warranted in law and which should have been passed (s 668E(3)). That was a sentence of three years imprisonment on count 2, suspended forthwith on the date of hearing the appeal. That application for leave to appeal was allowed, that order was made, and the court undertook to publish its reasons later, which it now does.