SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lam* [2007] QSC 137
PARTIES:	**R** **v** **NHAN QUI LAM** (defendant)
FILE NO:	Indictment No 692 of 2006
DIVISION:	Trial
PROCEEDING:	Sentence
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	7 June 2007
DELIVERED AT:	Brisbane
HEARING DATE:	7 June 2007
JUDGE:	Fryberg J
ORDER:	**1. Revoke the intensive correction order made in the Supreme Court on 15 August 2006** **2. Commit the prisoner to prison for 297 days being the portion of the term of imprisonment to which he was sentenced on that day which was unexpired on 21 October 2006**
CATCHWORDS:	Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Breach of intensive correction order – Committal to prison – Setting parole release date *Corrective Services Act 2006* (Qld) s97 *Penalties and Sentences Act 1992* (Qld) s112, s113, s126(4), s127, s130, s160A, s160B, s160D, s189
COUNSEL:	Crown: S Vasta Defendant: S Ngyuen
SOLICITORS:	Crown: Director of Public Prosecutions Defendant: TDT Lawyers

SUPREME COURT OF QUEENSLAND

QSC 137

CRIMINAL JURISDICTION

FRYBERG J

Indictment No 692 of 2006

THE QUEEN

v.

NHAN QUI LAM

BRISBANE

..DATE 07/06/2007

SENTENCE

HIS HONOUR: The prisoner was sentenced by me on the 15th of August 2006 to imprisonment for one year. At the same time I made an intensive correction order in respect of him. I did those things under sections 112 and 113 of the Penalties and Sentences Act or more accurately I made the intensive correction order under section 112 of the Penalties and Sentences Act and the effect of that order is spelt out in section 113.

The prisoner contravened the first requirement of the order, namely that he not commit another offence during the period of the order, on the 21st of October 2006 by driving a motor vehicle whilst under the influence of liquor. He, therefore, comes before me as a result of having appeared in the Magistrates Court and being convicted of that offence.

It is not altogether clear that an order of committal was made by the Magistrate to bring him before this Court but in any event he turned up and was and is before the Court. A report of his performance has been made by Mr Derrick Spellman, a probation and parole officer. His response to supervision has been poor.

He has failed to report without reasonable excuse on a total of eight occasions. He has failed to attend community service without a reasonable excuse on 16 occasions and I would add there have been a further 13 occasions when he failed to attend community service on which his excuse was accepted.

He has attended community service on only five occasions. He was also ordered to attend for drug testing as directed and has done so on nine occasions when his tests were clear but has failed to attend testing without a reasonable excuse on 13 occasions. His performance description of "poor" is, therefore, well justified.

His criminal history dates back to 2004. He had not served any imprisonment at the time that I imposed the intensive correction order and he is a young man still only 21 years of age. His offences appear to relate to drugs and it seems to be accepted that he, at one stage at least, fell into bad company.

The Crown submits that I should now proceed under section 127 to commit him to prison for the unexpired portion of the term within the meaning of that section. On his behalf Mr Nguyen has submitted that I should instead proceed under section 126 subsection (4) and impose a probation order, the basis being that he is young; residing at home; that his failures to comply have been due to work commitments (he was too tired after long hours of work to attend on those occasions when he should have attended); that he found it difficult to commit to the number of hours required; that he is depressed and suicidal; that he had two days in hospital as a result of the accident which occurred when he drove under the influence of liquor, part of it in a coma; and that he has made a genuine attempt to better himself.

The report, Exhibit 5, however, records that he was referred to Princess Alexandra Mental Health Triage on 23rd March 2007 due to concerns raised by his legal representatives that he was suicidal and the hospital reported that he presented with no ongoing mental health issues.

One question which has arisen in the course of the submissions is whether if I accept the Crown's submission I should also fix a parole release date. Mr Vasta, on behalf of the Crown, initially submitted that I should do so but the matter has been adjourned for further consideration and that submission is no longer pressed.

It seems to me that the withdrawal of the submission is rightly made.

Section 112 provides that the Court may make an intensive correction order for the offender if it sentences him to a term of imprisonment. On its face that makes it clear that the term of imprisonment is a condition precedent to the intensive correction order not a part of it.

Section 113 makes clear what is the effect of an intensive correction order. The effect is that the term of imprisonment is to be served in the community and not in prison, or more accurately by way of intensive correction in the community and not in prison.

Under section 127, a Court does not resentence the offender, rather it simply orders that he be committed to prison for the portion of the term of imprisonment that was unexpired on the day the relevant offence against section 123 (1) was committed. That is the day that the offender contravenes without reasonable excuse a requirement of the order, which in this case was the 21st October 2006.

Section 127 is, I think, structured in the way in which it is because it recognises that the term of imprisonment is something separate from the intensive correction order. It is only the latter which is revoked under the section. The original sentence of imprisonment remains.

In that respect there is a contrast and perhaps a degree of tension between that section and section 126 (4). It must however be remembered that the latter section is not restricted to intensive correction orders but is meant to deal with all community based orders.

In most if not all cases, whatever may be the extent of the power conferred by section 126(4), it would not be proper to sentence an offender to imprisonment while allowing the original term of imprisonment to stand. That ought to be done (at least in ordinary circumstances) only if the sentence of imprisonment initially imposed were in some way, revoked. There does not seem to be any power to do that.

Mr Vasta submitted that that was the effect of Section 130. That section however has two limbs and in the present case at least, there are no contraventions taken into account under section 189; so the second limb is not satisfied.

Mr Vasta submitted that that limb should be read in effect as if it included the words "if any", that is, that the Court would take into account contraventions of other orders if any so that the section could operate even when there were no matters under section 189, but it seems to me that the section is designed specifically to deal with that particular situation.

In any event, even if the submission were correct, the only effect of section 130 would in my judgment be to discharge the intensive correction order. It would not operate to discharge the term of imprisonment originally imposed. That term was imposed under Part 9 of the Act and as I have said, is still extant.

That being so, the question arises whether there should, if I proceed under section 127, be any order made in respect of parole release. Sections 160B to 160D of the Penalties & Sentences Act apply if a Court is imposing a term of imprisonment on an offender for an offence. However, when acting under section 127, a Court is not doing that. The term of imprisonment has already been imposed. There is a definition of "impose" in Division 3, but it is not helpful for present purposes.

Section 160A makes it plain that a Court cannot make a recommendation for a person's release on parole and that sections 160B to 160D are the only law under which a Court may make an order relating to a person's release on parole. There is no provision for making an order relating to a person's release on parole when committing an offender under section 127.

That outcome does not seem to me to produce any particular injustice. The offender will not necessarily have to serve the full period of the original term of imprisonment because he will, if he is of good behaviour, become eligible in due course for conditional release under section 97 of the Corrective Services Act 2006. That would mean that he would, in the present case, have to serve a total of eight months of the original 12 monthly sentence, he having already served 68 days of that period.

In my judgment, the course proposed by Mr Nguyen of imposing a probation order on this prisoner is not appropriate. He has failed to respond to the requirements of the intensive correction order and I see no reason to suppose that he would respond to a probation order. When I originally sentenced him, the Crown contended that there should be a suspended sentence with some actual time in prison and I observed that there was much force in that submission. I did not accede to it in the light of the prisoner's age, fairly insignificant criminal history, the fact that he had never had convictions recorded, nor been sentenced to imprisonment and the fact that

he was said to be free of heroin and ought to be given a chance. He was given the chance and he has not responded to it. In my judgment now, the appropriate course to take is that authorised by section 127 of the Penalties & Sentences Act.

I revoke the intensive correction order made in this Court on the 15th August 2006.

I commit the prisoner to prison for 297 days being the portion of the term of imprisonment to which he was sentenced on that date which was unexpired on the 21st October 2006.
