DISTRICT COURT OF QUEENSLAND

CITATION:	*Morris v Spink* [2008] QDC 270
PARTIES:	**JOEL ALEXANDER MORRIS** (Appellant) v **REBEKAH MAREE SPINK** (Respondent)
FILE NO/S:	3041/2008
DIVISION:	Appellate
PROCEEDING:	Appeal against sentence under s 222 of *Justices Act 1886*
ORIGINATING COURT:	Brisbane
DELIVERED ON:	21 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	19, 21 November 2008
JUDGE:	Robin QC DCJ
ORDER:	**Extension of time for appealing granted. Appeal allowed. Magistrates' orders substituting parole eligibility date for fixed parole release date set aside, likewise the original order**
CATCHWORDS:	*Justices Act* 1886 s 142(2) s 222, s 224(1)(a), *Penalties and Sentences Act* 1992 s 115(b), s 160B, s 188. *Corrective Services Act* 2006 s 209 - appeal against custodial sentence instituted out of time following Magistrate's amendment 6 weeks later at the instance of correctional authorities managing the appellant's imprisonment and without any court hearing to replace a fixed parole date (then 8 days in the future) with a recommendation for parole eligibility as at the same date – appellant still in custody, his parole application apparently undetermined – sentence should not have been made more onerous without appellant being heard – both original and subsequent orders about parole set aside – court inclined to give effect to Magistrate's expressed intentions as well as could be done by an intensive correction order.
COUNSEL:	Ms Hillard (solicitor) for the appellant Ms Overell for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions for the respondent

[1] Before the court are an appeal under s 222 of the *Justices Act 1886* in respect of sentences imposed at Southport Magistrates Court on 18 August 2008 on the grounds that "the sentence imposed was manifestly excessive" and also an application for extension of time under s 224(1)(a), notices in respect of both being filed on 29 October 2008. The respondent acknowledges that the extension of time ought to be granted.

[2] The circumstances are concerning. On 18 August 2008, Mr Morris, who has a bad criminal history which has seen him actually incarcerated for 497 days (declared as served against a 3-year sentence in Southport District Court on 8 July 2005) and 175 days (declared as time served against a sentence of two years imposed at Southport Magistrates Court on 4 October 2006) pleaded guilty to five offences of receiving, one of possession of tainted property and one of possession of drugs. For the receiving offences he was sentenced to nine months imprisonment, for the others two or three months. The Magistrate said:

> "The question really is, how long you should be imprisoned before being released back into the community. Now, when I look at that particular aspect of this sentence, it's apparent from the pre-sentence custody that when you were taken back to police custody on the 24th April 2008, after being picked up by the police for these matters, you were returned to prison and required to serve a sentence for another matter and the end date of that sentence is the 8th August 2008; so there is only nine days available for pre-sentence custody declaration on these matters and from the certificate, that is between the 9th August 2008 and the 18 August 2008.
>
> To my mind, you should still serve some more time in actual imprisonment, but I do intend to release you on Court ordered parole, but it won't be until October.
>
> Now, the offences – for the each offence of receiving stolen property, you're convicted and sentenced to nine months imprisonment. For the offence of possession of heroin, you're convicted and sentenced to three months imprisonment and for the offence of tainted property, you're convicted and sentenced to two months imprisonment. All of those terms of imprisonment are to be served concurrently with each other and so the head sentence then, is the nine months imprisonment. I will make the declaration that you have been in custody in relation to these matters, between the dates 9th August 2008 and the 18 August 2008, namely nine days, and I declare that that whole period of nine days is imprisonment already served under the sentence.
>
> As I say, I am required to fix a parole release date. In considering that date, I will give a general recognition of the fact that you've been in custody since April 2008 and Ms Allen urges that I take that into account. I gave due weight also to your plea of guilty, and also to provide some scope in the sentence order, to return you to the community to be under the supervision of a parole officer and for you to undertake the types of programs that Ms Allen refers to.

> The parole release date I've set at the 8th October 2008, which effectively means that you serve three months of the nine months, and then you're on parole for the six months of the nine months."

[3] There seems to have been some miscalculation, in that actually serving three months would indicate a parole release date in November 2008.

[4] Mr Morris had previously been given a fixed parole release date of 13 April 2007 when the Southport District Court on 20 December 2006 ordered that the 598 days balance of its suspended sentence be served. He was thus on parole when on 24 April 2008 he committed the offences dealt with by her Honour. The consequence, not noticed on 18 August 2008, by reason of s 209 of the *Corrective Services Act 2006* and s 160B(2) of the *Penalties and Sentences Act 1992*, was that a parole eligibility date ought to have been set, rather than a fixed date for parole under s 160B(3).

[5] It appears that Corrective Services authorities, required to manage the sentence, took it upon themselves to communicate with her Honour, who "administratively" amended what had been done in court on 18 August 2008, as described in the following communication:

> "Our Ref: Depositions Section
> Contact: Mr D C Pitman
> Phone: ----------
> Website: www.justice.qld.gov.au
>
> DATE: 30 September 2008
>
> ATTENTION: Ms Kathryn FLETCHER, Administration Officer, Sentence Management, Brisbane Correctional Centre
>
> FACSIMILE NUMBER: ----------
>
> FROM: David Pitman, Magistrates Courts Office, Southport
>
> SUBJECT: Inmate – Joel Alexander MORRIS
>
> MESSAGE:
>
> Dear Ms Fletcher,
>
> Thank you for your facsimile of 26 August 2008. I advise that your facsimile has been referred to Her Honour Mrs Pirie, Magistrate.
>
> Please find enclosed amended imprisonment warrants in respect of the abovementioned Prisoner. The Warrants have been amended to reflect a Parole Eligibility date rather than a Parole Release date.
>
> Thank you for your assistance in relation to this matter.
>
> Please do not hesitate to contact me if I can be of further assistance.
>
> Yours faithfully

D.C. Pitman
For Principal Registrar, Magistrates Courts Office, Southport"

[6] The consequences have been dire from Mr Morris' point of view. Instead of being released into the community on parole eight days later, he is apparently still awaiting determination of an application for parole made on 3 October 2008, and still in custody.

[7] The court is asked by Ms Hillard of the Legal Aid Office representing Mr Morris to deprecate the procedure adopted, which I am told is far from unprecedented. Proceeding in this way is to be deprecated. Section 142(2)(b) of the *Justices Act 1886* where it applies bespeaks a requirement that a defendant suffering imprisonment under an order in the Magistrates Court be entitled to appear for the purpose of making submissions. In *Jones v Commissioner of Police* [2008] QDC 227 a Magistrate had sentenced a prisoner to two months imprisonment concurrent on 15 November 2007, declining to change a current parole eligibility date of 31 August 2008. It was common ground that this represented an error and that a new parole eligibility date should have been fixed. The Magistrate purported to do that (fixing 10 January 2010) on 4 March 2008. It seems that Jones heard of this only after the event; he was allowed to appeal out of time. Judge Forde observed on 27 August 2008 that "because the date has been changed, the appellant has been deprived from applying for release up to this point" (see para [3]). In paragraph [4], his Honour said:

> "Clearly the appellant was entitled to be heard on the adjourned occasion in March 2008. Section 142(2) of the *Justices Act 1886* recognises that right. It would be a miscarriage of justice if the defendant is not given notice of the hearing and sentenced to a harsher penalty without submissions on his behalf."

His Honour went on:

> "[5] The end result of the change of the Eligibility Date is that the appellant will spend some further time in prison certainly until a decision is made."

[8] The appellant here had somehow got wind of Corrective Services' approach to the Magistrate (for which it seems to me there is no warrant whatever, the situation being that Corrective Services' understandable concerns ought to be raised by being communicated to the sentencing court through the prosecution or the defence—at the least dealt with in a process including them) and had indicated he wished to be heard. The sentence ought to have been reopened formally under s 188 of the *Penalties and Sentences Act*, on the occasion of which, by subsection (3)(a), the court "must give the parties an opportunity to be heard." In fairness to the Magistrate here, it ought to be noted that her Honour, prior to 30 September 2008, had some contact with the lawyers, who appeared for Mr Morris on the original sentence and was given to understand that they were accepting of the appropriateness of changing the orders of 18 August 2008. It seems clear there were some miscommunication here. It is unclear whether the lawyers held any instructions for Mr Morris or were still acting. Mr Morris' affidavit deposes that,

following advice in early September 2008 that the sentence might have to be reopened, he confirmed to Legal Aid Queensland on 16 September 2008 that he wanted to be represented at the reopening; he says "Sentence Management" advised him on 27 September 2008 that they would not worry about reopening the sentence, further advising three days later that his parole release date had been changed to a parole eligibility date, the relevant date remaining 8 October 2008. He confirms he was not taken to court for any reopening proceedings. He says he was told on or about 5 November that his application for parole was rejected – which seems inconsistent with other information the court has.

[9] What was done on 30 September 2008 – which, in my opinion, ought to have been done in open court under s 188 at a hearing in which the parties were given full opportunity to participate - inevitably produced a just grievance in Mr Morris by extending his incarceration; there is no practical way in which he could have applied for and got parole by 8 October 2008. Her Honour was asked by Mr Morris' legal representative to reopen the sentence on 14 November 2008 to set aside the order or orders of 30 September 2008 "on the basis that it was incorrect to order a parole eligibility date. This ground of appeal has now been withdrawn. The Magistrate declined to reopen the sentence as this Appeal was pending, and the matter is adjourned to a date to be fixed." (See 6.16 of the respondent's outline of submissions filed 18 November 2008.) On that occasion, her Honour placed on the record her understanding of the pertinent history.

[10] While not necessarily in accord with views expressed above regarding s 188, Ms Overell, for the respondent, accepts that the appellant was denied natural justice by the sentencing magistrate in the several Orders of Commitment of Offender where Punishment is by Imprisonment of 30 September 2008 in the way that happened, rather than re-open the sentences of 18 August 2008, and that those Orders (of which there are seven) ought to be set aside.

[11] It appears to be common ground now that there was an error by her Worship in not fixing a parole eligibility date, rather than a fixed parole date. Ms Overell's submission is that the matter should be remitted to the Magistrate for a re-opening under s 188.

[12] That is an unattractive course. It leaves the appellant in custody for an uncertain period and commits the system and all concerned in it to another court hearing.

[13] Neither party was disposed to challenge her Honour's sentence as excessive or lenient until the steps of 30 September 2008 were taken. That in this court considerable deference is due the Magistrate's views appears from *Stevensen v Yasso* [2006] QCA at [36], referred to in *Jones*, where, apropos the *audi alteram partem* principle, reference is made to *R v Kitson* [2008] QCA 86 at [22].

[14] Her Honour clearly wished to have Mr Morris returned to the community under supervision; whether that was to be after two months (as originally ordered) or three is now moot. There has been custody legally declarable as credit against the sentence from 9 August 2008; I respectfully agree with her Honour that while not legally declarable, the earlier period from and after the date of the current offences is entitled to some recognition: the detriments suffered by Mr Morris in consequence of the offences include his liberty being forfeited for that period of time.

[15] While Ms Overell submits that this court, should it decide to conclude the matter itself, rather than remit to the Magistrate, ought to retain the parole eligibility date set by her Honour (the effect of which is little different from now ordering immediate eligibility), I am disinclined to leave Mr Morris to the mercies of the parole authorities, or burden them with having to consider his case. He has now served well over the customary one third of the head sentences following guilty pleas, after which return to the community on a suspended sentence or on parole is traditionally considered appropriate. The former approach leaves the appellant unsupervised; the latter, in practical terms, should be disregarded.

[16] That leaves Ms Hillard's suggestion of retaining the sentences pronounced (if they are not to be reduced) but making an intensive correction order in lieu of a parole recommendation.

[17] I think that a sound approach, subject to arguments Ms Overell may be able to present. The matter was adjourned to enable Ms Hillard to obtain in affidavit form Mr Morris' consent to the making of an intensive correction order. That is required by s 117 of the *Penalties and Sentences Act*; I prefer to have something from Mr Morris himself before considering whether or not to make an intensive correction order, rather than (as sometimes happens) delegate to Ms Hillard responsibility for carrying out at some time in the future the responsibility the court has under s 116. I took the liberty of communicating to her the advisability of getting Mr Morris' consent to the inclusion of a condition that the matter be mentioned in February 2009 with Mr Morris' appearance required, to review his performance under the intensive correction order, it being anticipated that a "court report" from his supervisors would be available at that time. The advisability of a condition on those lines was canvassed during the argument on 19 November 2008. In my view, s 115(b) would authorise such a condition. Otherwise, and except as set out in the *Penalties and Sentences Act*, the requirements of intensive correction order are for the supervising community corrections officers to determine; in this instance, they may well turn out to be closely modelled on the requirements that might apply were the appellant on parole. An advantage of a fixed day in court is that the authorities will not face the difficulty of finding Mr Morris to serve process on him, should he disappoint in his performance; also it provides a limited substitute for the "sudden death" aspect of parole, whereby re-offending results in its cancellation.

[18] The appellant is allowed an extension under 29 October 2008 to start his appeal against the sentences imposed on 18 August 2008. The Magistrate's orders of 30 September 2008 are set aside, likewise those made on 18 August 2008, but only in respect of parole. Instead, subject to further argument an intensive correction order will be made, which includes a condition that the appellant appear on 20 February 2009 (if no other date is fixed) so that the court may review his progress under the intensive correction order and a requirement that, for purposes of the order, he report to a suitable community corrections office to be nominated by his representative no later than the close of business on the first business day after his release from custody. A declaration should be made that he is entitled to credit as time served against the sentence for the period 9 August 2008 until today's date, 21 November 2008, being 104 days.

Note: Following the handing down of this decision and submissions by the parties, orders were made varying those proposed above. See [2008] QDC 271.