SUPREME COURT OF QUEENSLAND

CITATION:	*R v MacKenzie* [2000] QCA 324
PARTIES:	**THE QUEEN** **v** **MACKENZIE, Lorna Margaret** (applicant)
FILE NO/S:	CA No 353 of 1999 SC No 522 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 August 2000 20 October 2000
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2000 2 May 2000 13 October 2000
JUDGES:	McMurdo P, McPherson JA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**Application to reopen sentence imposed on 11 August 2000 granted. Order that the sentence be varied by deleting the recommendation for early parole and substituting an order that the sentence be suspended forthwith with an operational period of five years.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS - REMISSION, PAROLE AND PRISONER CLASSIFICATION – application to reopen sentence – where Court did not know of applicant's security classification and effect on receiving parole – whether "clear factual error of substance" pursuant to s 188 *Penalties and Sentences Act* 1992 *Corrective Services Act* 1988, s 139(1) *Penalties and Sentences Act* 1992, s 188(1)(c), s 188(5) (b)

R v Maxfield [2000] QCA 320; CA No 19 of 2000, 8 August 2000, considered
R v Pettigrew [1997] 1 Qd R 601, referred to

Williams v Queensland Community Corrections Board [2000] QCA 75; Appeal No 6237 of 1999, 17 March 2000, distinguished

COUNSEL: Mr A Boe *(sol.)* for the applicant
Mr D Meredith for the respondent

SOLICITORS: Boe & Callaghan for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I have read the reasons of Dutney J with which I am in general agreement.

[2] On 11 August 2000, the applicant was successful in having this Court reduce her original sentence of eight years imprisonment with a recommendation for eligibility for parole after three years to five years imprisonment with a recommendation for eligibility for parole after one year.

[3] The applicant reached the earliest date for consideration for parole eligibility on 6 September 2000. On 17 August 2000, she applied to the Community Corrections Board for release on either home detention or parole.

[4] Ministerial guidelines to the Queensland Community Corrections Board made pursuant to s 139(1) *Corrective Services Act* 1988 and issued in February 2000 state:

> "2.2 A prisoner should achieve a low or open security classification prior to approval for release to a community based program. At the discretion of the Board medium security classification prisoners can be considered for release to a community based program where:
> (a) circumstances indicate an exception is unlikely to increase the level of risk to the community;
> (b) the prisoner is close to the point of reduction from a medium to a law security classification; and
> (c) the prisoner is not serving a sentence for a serious violent offence."

[5] On 2 October 2000, the applicant was informed in writing that the Board had considered her application on 19 September 2000 but declined it because:

> "The delay in having the appeal disposed of has delayed your participation in programs and reduction in your classification.
>
> Your present classification is medium security on 38 points. This classification is too high to allow the Parole Board to approve of release to the community. The Board advises that you should undertake and satisfactorily complete the cognitive skills program

> and any other recommended program to address your offending behaviour. These programs will assist you to obtain a low classification."

[6] The applicant's security classification was therefore fundamental to any successful parole application.

[7] Mr Boe, who appears for the applicant, informs the Court that the applicant's classification within the corrections system, even after her successful appeal, was based on the primary judge's sentence, not the sentence of the Court of Appeal. This is because scheduled reviews of a prisoner's classification only occur at three to six month intervals. After the Court of Appeal's decision reducing the applicant's sentence on 11 August 2000, she remained classified in accordance with the original sentence until her next scheduled sentence review on 10 October 2000. The applicant's next scheduled review is 10 January 2001.

[8] These facts were not contested by the respondent.

[9] If this is the system, it appears to me, at least on the material before this Court, to be less than satisfactory; a system of timely review whenever there has been a successful appeal against sentence, thereby ensuring a prisoner's classification accurately reflects the actual sentence would seem preferable. Of course, there may be reasons not canvassed before this Court which would make this suggestion impractical or undesirable.

[10] Had the applicant's lawyers known of her security classification and the consequence that it was extremely unlikely that she would be able to achieve timely parole, they would have requested the Court to consider imposing a suspended sentence. Like Dutney J, had I known these facts, I may well have imposed a suspended sentence instead of making a recommendation for early parole. Although the question is finely balanced, I am finally persuaded that the sentence imposed by this Court on 11 August 2000 was decided on a clear factual error of substance and accordingly under s 188(1)(c) *Penalties & Sentences* Act 1992 this Court may re-open the applicant's sentencing proceedings. I stress this case turns very much on its own special facts: it is not appropriate to re-open a sentence under that section merely because a judicial recommendation for parole is not subsequently followed by the Community Corrections Board.

[11] For the reasons given by Dutney J, I am persuaded that in this most unusual case, the appropriate sentence is to suspend the term of imprisonment of five years forthwith. I agree with the order proposed by Dutney J.

[12] **McPHERSON JA**: I have read the reasons of Dutney J. There remains for me a difficulty in characterising as "a clear factual error of substance" a matter to which no one adverted at the time of the sentence hearing. But I, of course, accept that the majority must have acted on an assumption that the recommendation for parole after 12 months would be at least capable of receiving effect. On this footing, I am content to agree with the order proposed by Dutney J.

[13] **DUTNEY J:** On 29 September 1999 the applicant, Mrs MacKenzie pleaded guilty to the manslaughter of her husband and was sentenced to 8 years imprisonment with a recommendation that she be considered eligible for parole after 3 years.

[14] Mrs MacKenzie appealed against her conviction and sought leave to appeal her sentence. Her appeal and application for leave were heard by this Court on 31 March and 2 May 2000. Judgment was reserved and on 11 August 2000 Mrs MacKenzie's appeal was dismissed but her application for leave to appeal against sentence was allowed, and the original sentence varied by substituting a head sentence of 5 years with a recommendation that she be considered eligible for parole after 1 year.

[15] Mrs MacKenzie's 1 year non-parole period expired on 6 September 2000.

[16] On 17 August 2000 Mrs MacKenzie appealed to the Community Corrections Board under ss 81 and 165(1) of the *Corrective Services Act* 1988 for release on either home detention or parole.

[17] On 27 September 2000 the Board wrote refusing the application and proffering the following explanation:

> "The delay in having the appeal disposed of has delayed your participation in programs and reduction in your classification. Your present classification is medium security on 38 points. The classification is too high to allow the Parole Board to approve release to the community. The Board advised that you should undertake and satisfactorily complete the Cognitive Skills program and any other recommended programmes to address your offending behaviour. These programs will assist you to gain a low classification."

Mrs MacKenzie received the Board's letter on 3 October 2000.

[18] Since receiving the Board's letter Mrs MacKenzie has been told by corrective officers and sentence management personnel that she will not be considered eligible for release until she has completed a cognitive skills program which she should be able to start almost immediately and which would take eight weeks to complete. She also had her classification reviewed on 10 October 2000. She expects to be reduced from a medium classification to an open classification within the next couple of weeks. Thereafter Mrs MacKenzie will not be further reviewed until January 2001. At the review Mrs MacKenzie was told that she would not be entitled to re-apply for parole until she had commenced the cognitive skills programme.

[19] During the pendency of her appeal Mrs MacKenzie was ineligible to undertake the cognitive skills programme.

[20] It was submitted, and not contradicted by the Director of Public Prosecutions that Mrs MacKenzie will not be able to be paroled before January 2001. I should add that the Director of Public Prosecutions did not seek to contradict any of the factual assertions put forward on behalf of Mrs MacKenzie.

[21] The application currently before the Court is to reopen the sentence and vary it to suspend that portion not yet served so that Mrs MacKenzie might be released at once.

[22] The application is said to be based on ss 188(1)(c) and 188(5)(b) of the *Penalties and Sentences Act* 1992. The relevant parts of s 188 provide:

> "(1) If a court has in, or in connection with, a criminal proceeding, including a proceeding on appeal –
> (a) imposed a sentence that is not in accordance with the law; or
> (b) failed to impose a sentence that the court legally should have imposed; or
> (c) imposed a sentence decided on a clear factual error of substance;
>
> the court, whether or not differently constituted, may reopen the proceeding.
>
> (2) ...
>
> (3) If a court reopens a proceeding, it-
> (a) must give the parties an opportunity to be heard; and
> (b) may resentence the offender –
> (i) for a reopening under subsection (1)(a) – to a sentence in accordance with law; or
> (ii) for a reopening under subsection (1)(b) – to a sentence the court legally should have imposed; or
> (iii) for a reopening under subsection (1)(c) – to a sentence that takes into account the factual error; or
> (iv) …
> (c) may amend any relevant conviction or order to the extent necessary to take into account the sentence imposed under paragraph (b)
>
> (4) …
>
> (5) The court may reopen the proceeding –
> (a) on its own initiative at any time; or
> (b) for a reopening under subsection (1) – on the application of a party to the proceeding made within –
> (i) 28 days after the day the sentence was imposed; or
> (ii) any further time the court may allow on application at any time; or
> (c) …"

[23] The foundation of any relief of the type sought must be s 188(1)(c) which requires a finding that in varying the sentence this Court in imposing the substituted sentence acted on a clear factual error of substance. The power of Courts, including this one, was discussed by Fitzgerald P in *R v Pettigrew* [1997] 1 Qd R 601. It is sufficient to say that if the application cannot be brought within s 188, this Court has no power to reopen the sentence.

[24] The error identified by the applicant is set out in the outline of submissions as follows:

> "22. The applicant contends that the errors of substance made by the Court are that it imposed a sentence without being aware that:

> 22.1 its recommendation under section 157(2) would not take effect until:
>
> 22.1.1 other matters applied by the correctional authorities according to various policy guidelines had been complied with; or
>
> 22.1.2 the applicant's 'classification' as a prisoner by the correctional authorities was reduced;
>
> 22.2 that the applicant's 'classification' would or had been determined by a process which included an assessment of features already taken into account by the Court e.g.:
>
> 22.2.1 the nature of the offence;
>
> 22.2.2 the head sentence imposed; and
>
> 22.2.3 psychiatric and psychological needs identified by the correctional authorities;
>
> 22.3 that notwithstanding the reduction in sentence, the applicant would not be re-classified until her scheduled review on 11 October 2000;
>
> 22.4 that the applicant would be required to complete particular programs before her 'classification' became sufficiently low enough to permit her to be released to the community; and
>
> 22.5 that the applicant was precluded from starting such programs until after her appeal against conviction was disposed of."

[25] There is little assistance in the authorities as to the limits of the power to reopen sentence under s 188(1)(c) beyond general statements in cases such as *R v Jenson* [2000] QCA 38 and *R v Davis* [1999] QCA 486. I have not found those to be particularly helpful here.

[26] Applying the ordinary meaning of the words in the subsection it seems to me that the power is available when the Court imposing the sentence has acted on an erroneous factual basis in some material way.

[27] Is that the case here? Here in imposing a sentence with a recommendation for early parole the Court should be taken to have appreciated that such a recommendation is not a guarantee of release on the earliest possible date. The prisoner must still apply and satisfy the Community Corrections Board that it is appropriate to release her having regard to proper criteria and the circumstances of her particular case: see for example *Williams v Queensland Community Corrections Board* [2000] QCA 75. Since the relevant time for determination of the question of whether there was a factual error is the time of the sentencing proceeding sought to be reopened (see *R v Davis* [1999] QCA 486 per McMurdo P at para 3) it is not appropriate to reopen the sentence under the provision simply because it transpires subsequently that the recommendation is not given effect to by early release. I do not think s 188(1)(c) gives the Court that power. In this case, however, the applicant goes further and says that because of the way the system operates and the timing of the judgment of this Court she would never in fact have been released on or about the anniversary of her incarceration and that the Court must have been labouring under an erroneous view of that fact in imposing a sentence of imprisonment coupled with a recommendation that would never have been accommodated within the parole system irrespective of the particular merits of the applicant's case.

[28] My difficulty with this submission (which I expressed during the course of argument) was that the Court was never asked to consider any sentence other than a term of imprisonment with a recommendation for immediate release on parole (see paragraph 8 of the applicant's outline of submissions in support of her application for leave to appeal against sentence filed on 19 April 2000). If the Court was invited only to consider a recommendation even one which when asked for could not have been given effect to I had difficulty seeing how the Court was in error. It was merely granting what the applicant herself wanted, although slightly delayed.

[29] For myself, however, I had and have the view that Mrs MacKenzie should have been released after about 12 months for reasons I expressed in my judgment on the appeal. At the same time I recognised that Mrs MacKenzie might not after close consideration of her application be released at the time I expected. Had I been aware that for reasons set out above and in the material filed on this application that Mrs MacKenzie could not have been released because despite the recommendation she was not then to be considered eligible to apply and that by virtue of the appeal itself Mrs MacKenzie was precluded from putting herself into a position to apply I may well have considered a different course. Since I was a member of the majority in relation to sentence I have therefore come to the conclusion that in determining the sentence the Court acted under the factual error that the recommendation could be even if it might not be given effect to and that that error is sufficient to enliven the power under s 188(1)(c).

[30] I remain of the view that subject to matters arising during her imprisonment Mrs MacKenzie should have been released after about 1 year imprisonment. Given her background, details of which are set out in the judgment of McPherson JA in the appeal I cannot think Mrs MacKenzie would gain much by undergoing the cognitive skills programme as it is described in exhibit "PM5" to the affidavit of Paula Morreau. I would consider Mrs MacKenzie better served by the type of support parole can provide. In balancing whether she should remain in custody for a further three or four months in order to obtain that support I have had regard to paragraph 16 of her affidavit in which she swears that whether ordered to or not she intends to recommence attendances at Dr McGrath and follow her recommendations. I favour her early release. This has been a sad case throughout and I do not think any interest of justice is now being served by Mrs MacKenzie remaining in prison.

[31] The critical feature of this case which allows the operation of s 188(1)(c) is that the Court gave a recommendation which simply could or would not be implemented by those charged with the subsequent supervision of the applicant. That circumstance was occasioned by matters beyond even the theoretical power of Mrs MacKenzie to remedy because she was within the appeal process. Judges of all courts are aware that their recommendations as to parole eligibility only set the earliest possible date after which a prisoner can be released and that prisoners are frequently not given parole until later, sometimes much later and sometimes, not at all. This is plain from cases such as *Williams v Queensland Community Corrections Board* [2000] QCA 75 and *R v Maxfield* [2000] QCA 320. Despite what was said by the majority in *Maxfield*, the judgment in which was delivered before judgment in Mrs MacKenzie's appeal, the true fact here was that despite the recommendation the Community Corrections Board would not consider Mrs MacKenzie's application on

its merits at the recommended time. While this refusal may constitute a reviewable error of law, the fact of the refusal is a fact which may also enliven s 188(1)(c).

[32] In reconsidering the sentence under s 188(3)(b)(iii) of the Act I would order that the sentence be varied by deleting the recommendation for early parole and substituting an order that the sentence be suspended forthwith with an operational period of five years.