

DISTRICT COURT OF QUEENSLAND

CITATION: *Buchanan v Queensland Police Service* [2025] QDC 212

PARTIES: **KAINEN LUKE HENRY BUCHANAN**
(appellant)

v

QUEENSLAND POLICE SERVICE
(respondent)

FILE NO: APPEAL NO: DC 122/25

DIVISION: Appellate

PROCEEDING: Appeal

ORIGINATING COURT: Magistrates Court, Cairns

DELIVERED ON: 19 December 2025

DELIVERED AT: District Court, Cairns

HEARING DATE: 19 December 2025

JUDGE: Morzone KC DCJ

- ORDER:
- 1. Appeal allowed.**
 - 2. The sentence and orders of the Magistrates Court made in Cairns on 28 October 2025 are set aside.**
 - 3. The appellant is resentenced, with his understanding and agreement, as follows:**
 - (a) On each charge, the appellant is to be imprisoned for a period of six months to be served concurrently with each other and concurrently with any other term of imprisonment.**
 - (b) It is further ordered that the appellant will serve those terms of imprisonment as an intensive correction order with the requirements set out in s 114(1) of the *Penalties and Sentences Act 1992* (Qld).**
 - (c) Convictions will be recorded for each offence.**
 - (d) The appellant is directed to report to the Parole and Probation Office at Cairns within 2 business days of his release from custody.**

- CATCHWORDS: CRIMINAL LAW – APPEAL AGAINST SENTENCE – ERROR OF LAW – sentence for public nuisance and going armed as to cause fear – review pursuant to s 222 *Justices Act 1886* (Qld) – whether an error in law by failing to afford the appellant natural justice or procedural fairness – whether error in law by not articulating his reasons for ordering a sentence to be made cumulative – whether magistrate impose an excessive sentence having regard to the cumulative effect of the sentence and the total unbroken period of imprisonment – whether error in law by not articulating his reasons for ordering a sentence to be made cumulative – whether an excessive sentence having regard to the cumulative effect of the sentence and the total unbroken period of imprisonment – resentence to intensive corrections orders.
- LEGISLATION: *Justices Act 1886 (Qld) s 222, s 223(1) & 227*
Corrective Services Act 2006 (Qld), ss 4, 209, Schedule 4
Penalties and Sentences Act 1992 (Qld), ss 9, 114(1), 156, 160B, 160F
- CASES: *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170
Addo v Senior Constable Jacovos [2016] QDC 271
Allesch v Maunz (2000) 203 CLR 172
R v Cooney [2019] QCA 166
Dinsdale v The Queen (2000) 202 CLR 321
Dwyer v Calco Timbers (2008) 234 CLR 124
Forrest v Commissioner of Police [2017] QCA 132
Fox v Percy (2003) 214 CLR 118
R v Hatahet (2024) HC 23
House v The King (1936) 55 CLR 499
Kentwell v R (2014) 252 CLR 60
Kioa v West (1985) 159 CLR 550
R v Lemass (1981) 5 A Crim R 230
Lovell v Lovell (1950) 81 CLR 513
Lowe v The Queen (1984) 154 CLR 606
R v Major [2025] QCA 5
McDonald v Queensland Police Service [2017] QCA 255
Mill v The Queen [1988] 166 CLR 59
Nguyen v The Queen (2016) 256 CLR 656
Norbis v Norbis (1986) 161 CLR 513
R v Margaritis; Ex parte Attorney-General (Qld) [2014] QCA 219
R v McIntosh [1923] St R Qd 278
R v Morse (1979) 23 SASR 98
R v Nagy [2004] 1 Qd R 63
R v Perini; ex parte A-G (Qld) (No 2) [2011] QCA 384
R v Ponsonby (2024) QCA 229
SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship [2013] FCAFC 80

SZTQL v Minister for Immigration and Border Protection and Another (No 2) (2015) 150 ALD 456
Teelow v Commissioner of Police [2009] QCA 84
The Queen v Baker [2011] QCA 104
The Queen v Beattie, ex parte Attorney-General (Qld) [2014] QCA 206
The Queen v Crofts [1999] 1 Qd R 386
The Queen v Kendrick [2015] QCA 27
Veen v The Queen [No 2] (1988) 164 CLR 465
Wainohu v New South Wales (2011) 243 CLR 181
Warren v Coombes (1979) 142 CLR 531
R v WBQ [2022] QCA 48
White v Commissioner of Police [2014] QCA 121

COUNSEL: K McDonald for the respondent.

SOLICITORS: Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd for the appellant.
 The Office of the Director of Public Prosecutions for the respondent.

Summary

- [1] On 28 October 2025, the appellant plead guilty in the Cairns Magistrates Court to charges of going armed so as to cause fear and public nuisance, and was sentenced to concurrent terms of three months imprisonment and two months imprisonment respectively, with these terms ordered to be served cumulatively upon an existing sentence of two years imprisonment that expires on 5 March 2026. A parole eligibility date was set at 27 December 2025.
- [2] The appellant now appeals his sentence on the grounds that:
1. The sentencing magistrate erred in law by failing to afford the appellant natural justice or procedural fairness.
 2. The sentencing magistrate erred in law by not articulating his reasons for ordering a sentence to be made cumulative.
 3. The sentencing magistrate erred by imposing a sentence that was manifestly excessive.
- [3] The respondent properly concedes that the sentence was manifestly excessive to the extent that the sentencing magistrate did not have regard to the total period of imprisonment when setting the parole eligibility date, which can be remedied by substituting a parole eligibility at the date of this appeal hearing, being 19 December 2025. Otherwise, the appeal is opposed.
- [4] Upon review, although the appellant was not afforded an opportunity to address the cumulative effect of the sentences, a cumulative structure (rather than concurrent terms or suspension) was open on the material and supported by adequate reasons.

- [5] However, the sentence is excessive because the magistrate set a parole eligibility date at 27 December 2025, which inevitably imposed a disproportionately high period of actual custody. Although the appeal offences occurred after the appellant's release on a board ordered parole, earlier court ordered parole was cancelled by operation of s 209 of the *Corrective Services Act 2006* (Qld), engaging s 160B(2), which required the court to set a parole eligibility date. The appellant now faces an unbroken 27 months imprisonment from 28 February 2024, with a full-time expiry date of 10 June 2026. Having served nearly 74% at sentencing (and about 81% by now), he ought to have been granted an immediate parole eligibility date at sentence, being 28 October 2025.
- [6] In the exercise of resentencing the appellant, it seems to me that the excessive impact would not be alleviated by resetting the parole eligibility date eight days earlier, as at the date of this appeal. Further, I have concluded that a suspended sentence is unavailable due to the offender's mature age, criminal history, serious public knife reoffending, poor rehabilitation efforts, multiple supervisory breaches, and the need for imprisonment with post-release supervision. I have concluded that the appropriate sentence is the imposition of six months imprisonment for each charge to be served in the community by way of an intensive correction order, which would see the appellant appropriately punished by way of imprisonment reflecting community denunciation, supervision and rehabilitation by way of intensive probation and community service.
- [7] Accordingly, I allow the appeal, and will set aside the sentence and orders made on 28 October 2025, and resentence the appellant, with his understanding and agreement, on each charge to imprisonment of six months to be served in the community by way of intensive correction order, and convictions will be recorded.

Appeal

- [8] The appellant appeals pursuant to s 222 of the *Justices Act 1886* (Qld).
- [9] Pursuant to s 223 the appeal is by way of rehearing on the original evidence, and any new evidence adduced by leave if there are special grounds for giving leave.
- [10] The rehearing requires this court to conduct a real review of the evidence before it (rather than a complete fresh hearing), and make up its own mind about the case.¹ Its function is to consider each of the grounds of appeal, having regard to the evidence and determine for itself the facts of the case and the legal consequences that follow from such findings.² In doing so, it ought pay due regard to the advantage that the magistrate had in seeing the witnesses give evidence, and attach a good deal of weight to the magistrate's view.³
- [11] By operation of s 222(2)(c), the appellant can 'only appeal under this section on the sole ground that a fine, penalty, forfeiture or punishment was excessive or inadequate', that is, 'beyond the acceptable scope of judicial discretion' or 'so outside

¹ *Fox v Percy* (2003) 214 CLR 118; *Warren v Coombes* (1979) 142 CLR 531; *Dwyer v Calco Timbers* (2008) 234 CLR 124; applied in *Forrest v Commissioner of Police* [2017] QCA 132, 5 and *McDonald v Queensland Police Service* [2017] QCA 255 at [47].

² *White v Commissioner of Police* [2014] QCA 121 at [5]-[8].

³ *White v Commissioner of Police* [2014] QCA 121 at [5]-[8]; *Forrest v Commissioner of Police* [2017] QCA 132, 5 & 6; *McDonald v Queensland Police Service* [2017] QCA 255 at [47].

the appropriate range as to demonstrate inconsistency and unfairness'.⁴ To succeed, the appellant must establish some legal, factual or discretionary error.⁵ Such an error may be specifically identifiable, but an otherwise undiscernible error may be inferred from the imposition of an excessive or inadequate sentence.

- [12] The decisions of *House v The King*⁶ and *Kentwell v R*⁷ distinguish cases of specific error and indiscernible excess or inadequacy. In the case of specific error, the appellate court's power to intervene is enlivened and it is duty-bound to re-sentence, unless in the separate and independent exercise of its discretion it concludes that no different sentence should be passed.⁸ By contrast, absent identifiable specific error, the appellate court ought only intervene if it concludes that the sentence falls outside the permissible range of sentences for the offender and the offence.⁹ Even if the appellate court finds that the sentence was at the extreme end of a permissible range, or has a different opinion about the way in which the discretion should be exercised, these are not sufficient justifications for review; it must be shown that the discretion miscarried, resulting in an excessive sentence.¹⁰ In that context, it may be vitiated by an error of principle, or by a failure to appreciate a salient feature, or there is otherwise a miscarriage of justice.¹¹

Sentence Proceedings

- [13] The sentence proceeded on an agreed statement of facts and backgrounded by the appellant's criminal history, pre-sentence custody certificate and sentence calculation document.
- [14] The offending can be summarised as follows:
- (a) Charge 1 - Public Nuisance – On 27 August 2025 at around 9.15 pm, the patrolling police came upon a disturbance where the 25 year old appellant was fighting another man in the middle of the road. As they physically fought, they yelled and swore at each other. Members of the public attempted to break the fight up and police intervened and separated the parties. Vehicles travelling on that road had to drive around to avoid the altercation.

⁴ *R v Morse* (1979) 23 SASR 98; *R v Lemass* (1981) 5 A Crim R 230; *R v McIntosh* [1923] St R Qd 278; *Lowe v The Queen* (1984) 154 CLR 606.

⁵ *Allesch v Maunz* (2000) 203 CLR 172 at [22] – [23] followed in *Teelow v Commissioner of Police* [2009] QCA 84 at [4]; *White v Commissioner of Police* [2014] QCA 121, [8], *McDonald v Queensland Police Service* [2017] QCA 255 at [47]; contrast *Forrest v Commissioner of Police* [2017] QCA 132 at 5.

⁶ *House v The King* (1936) 55 CLR 499 at 504 and 505.

⁷ *Kentwell v R* (2014) 252 CLR 601, [35], adopting *AB v R* (1999) 198 CLR 111 at [130] per Hayne J (minority).

⁸ *Kentwell v R* (2014) 252 CLR 601, [35], adopting *AB v R* (1999) 198 CLR 111 at [130] per Hayne J (minority).

⁹ *House v The King* (1936) 55 CLR 499, 504 and 505, *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 176-178; *Norbis v Norbis* (1986) 161 CLR 513, 517-519, and *Kentwell v R* (2014) 252 CLR 601, [35], adopting *AB v R* (1999) 198 CLR 111, [130] per Hayne J (minority). See also *Dinsdale v The Queen* (2000) 202 CLR 321 at 325 per Gleeson CJ and Hayne J, also applied by Chesterman J in *R v Perini; ex parte A-G (Qld) (No 2)* [2011] QCA 384 at [54].

¹⁰ *Lovell v Lovell* (1950) 81 CLR 513 at 519 per Latham CJ, 533-534 per Kitto J; see also *Gronow v Gronow* (1979) 144 CLR 513 at 519, 525, 534 and 537.

¹¹ *House v The King* (1936) 55 CLR 499, 504-505; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 176-178; *Norbis v Norbis* (1986) 161 CLR 513, 517-519.

¹¹ *House v The King* (1936) 55 CLR 499, 504 and 505.

- (b) Charge 2 - Going armed as to cause fear – About 4 hours later in the morning of 28 August 2025, the appellant walked from the north end of the street, towards a group of people. He was armed with a knife and a citizen armed themselves with a rubbish bin to protect themselves. Another armed themselves with a glass bottle. A citizen told him to put the knife down. They then threw rocks at each other, and the complainant ran, fearing he would get hurt with a knife, while members of the public were present.
- [15] The offence occurred while the appellant was on board ordered parole, and at the time of the sentence below on 28 October 2025, the appellant was subject of total unbroken period of imprisonment of two years.
- [16] The prosecutor outlined the two charges: committing public nuisance on 27 August 2025 and going armed so as to cause fear on 28 August 2025. He highlighted the appellant's eight-page criminal history and noted that he was on parole for prior domestic violence offending at the time of these new offences, describing this as a significant aggravating factor. While acknowledging the early guilty plea, the prosecutor emphasised that the appellant's history outweighed this mitigation and that the protection of the community was a primary consideration. He described the offending as involving a fight in the middle of the street on the first day, followed by the appellant carrying a large knife the next day and approaching the victim in a manner that caused fear. On that basis, the prosecutor submitted that a term of imprisonment in the range of six to nine months was well within the appropriate range.
- [17] The appellant's solicitor urged a more lenient outcome. He accepted that a term of imprisonment might be within range but advocated for any such term to be wholly suspended. He drew the court's attention to the 52 days the appellant had already spent in pre-sentence custody, describing this as a significant period for offences of this nature. In relation to the public nuisance charge, the solicitor submitted that the appellant had effectively been the victim, as the fight had been initiated by the other male involved. Regarding the going armed charge the following day, he explained that it arose from the same individual; the appellant had armed himself with a knife out of fear of being attacked again, although he conceded this provided no lawful excuse. The solicitor acknowledged the aggravating feature of offending while on parole, with the appellant's full-time release date approximately six months away, but highlighted mitigating factors including the appellant's relative youth, the early plea, the absence of any assault charges, and the fact that the knife had not been used to cause further harm. The solicitor outlined that the appellant had grown up between Mossman and Townsville, become involved with the wrong crowd in Mossman, later lived with his strict father in Townsville for five years, completed Year 11, undertaken numeracy and literacy courses, and obtained a white card for construction work, with intentions to pursue employment in construction and landscaping. He emphasised that the appellant, as the eldest of nine siblings, spent much of his time at home in Mossman caring for his mother and younger siblings, including walking them to and from school. The solicitor expressed concern that imposing a further term of actual imprisonment would likely trigger the cancellation of parole, potentially resulting in the appellant remaining in custody for a considerable additional period due to delays in parole processes. Instead, the solicitor submitted that a sentence of six months' imprisonment, wholly suspended for an operational period of 12 months, would provide a longer deterrent effect extending beyond the current parole period

while appropriately recognising the time already served in custody without formally declaring it. He characterised the offences as arguably non-violent and urged the court to adopt this fully suspended sentence as the most appropriate outcome.

- [18] The learned magistrate began his sentencing remarks by noting the appellant's early guilty plea, which mitigated the penalty. His Honour summarised the facts: the public nuisance offence involved a consensual street fight on 27 August 2025, where the appellant participated (though possibly not the aggressor), causing passing vehicles to take evasive action and interfering with public amenity. The more serious going armed offence occurred the next day, when the appellant approached the same victim with a knife, causing fear; the victim armed himself with a bottle, a standoff ensued, and rocks were later thrown. The learned magistrate found the offending aggravated by the appellant's parole status (for prior domestic violence matters) and the knife's role in causing fear. While the history differed somewhat from the current offences, deterrence was required. Previous lenient dispositions of community-based orders and a suspended sentence had been breached, including twice for the suspended sentence, demonstrating an inability to comply with non-custodial orders. Accordingly, his Honour rejected a further suspended sentence. Imprisonment was imposed for both offences, with the going armed sentence made cumulative on the existing parole term. Applying totality and considering (but not declaring) the 52 days' pre-sentence custody, his Honour reduced the notional six month term for the second offence to three months.
- [19] The learned magistrate sentenced the appellant to two months imprisonment for the public nuisance offence and three months imprisonment for the going armed offence. Those periods of imprisonment were ordered to be served concurrently with each other, but cumulatively upon the pre-existing sentence that expires on 5 March 2026. A parole eligibility date was set for 27 December 2025.

Did the learned magistrate err in law by failing to afford the appellant natural justice or procedural fairness?

- [20] The appellant contends that the learned magistrate erred by not affording the appellant procedural fairness in circumstances where there was no indication or submissions of the unexpected imposition of a cumulative sentence.
- [21] The respondent submits that no procedural unfairness occurred, as cumulative sentences featured in two prior outcomes in the appellant's criminal history and were reasonably *foreseeable*, and that the moderated overall period of imprisonment aligned with the prosecutor's submissions for concurrent terms of six to nine months.
- [22] The common law recognises a fundamental duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations.¹² A reasonable opportunity to be heard "requires that a decision-maker provide a claimant with an opportunity to be heard and an opportunity for the claimant to advance the entirety of his factual material and submissions before a conclusion is reached."¹³

¹² *Kioa v West* (1985) 159 CLR 550, 582.

¹³ *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, [35] per Flick J cited in *SZTQL v Minister for Immigration and Border Protection and Another (No 2)* (2015) 150 ALD 456, [3] per Allsop CJ.

- [23] It was common ground that the offending occurred while the appellant was on board ordered parole. The presentence custody certificate showed that the appellant was released on board ordered parole on 19 May 2025, which was suspended due to reoffending, and that the appellant was returned to custody on 6 September 2025. At the time of sentence, he was serving a total unbroken period of imprisonment of two years, effective from 28 February 2024 and due to expire on 5 March 2026. Further, the certificate disclosed that: *“For offences committed whilst on parole, if sentenced to a term of actual imprisonment, the parole order will be automatically cancelled (as per s.209, s.211 of the CSA 2006) and the prisoner may be required to remain in custody.”*
- [24] Section 156 of the *Penalties and Sentences Act* provides for cumulative orders of imprisonment in these circumstances, as follows:

“156 Cumulative orders of imprisonment

(1) If—

(a) an offender is serving, or has been sentenced to serve, imprisonment for an offence; and

(b) is sentenced to serve imprisonment for another offence;

the imprisonment for the other offence may be directed to start from the end of the period of imprisonment the offender is serving, or has been sentenced to serve.

(2) Subsection (1) applies whether the imprisonment for the first offence is being served concurrently or cumulatively with imprisonment for another offence.”

- [25] Therefore, the imposition of a cumulative sentence was not entirely unexpected. Nevertheless, while the court had discretion to structure the sentence in that manner, the possibility was not raised during the hearing, and the prosecutor did not advocate for a cumulative order. Instead, the prosecutor submitted that a term of imprisonment in the range of six to nine months was appropriate. The appellant's solicitor, in turn, urged an effective sentence of six months imprisonment, wholly suspended for an operational period of 12 months, with a focus on achieving a longer deterrent effect beyond the existing parole period while acknowledging, but not declaring, the presentence custody.
- [26] The first time the appellant learned of the prospect of a cumulative sentence was just before the learned magistrate pronounced the sentence, saying:

“My view is that orders for imprisonment should attach to each of these offences, and I intend to make a cumulative order with respect to charge 2, being the offence of going armed to cause fear.

Now, because I intend to make that cumulative order for imprisonment, I have to have regard to the principle of totality to ensure that the penalty imposed upon you is not crushing in the circumstances and fairly reflects your offending behaviour in this instance but also with respect to the offences which you are

currently subject to that order for imprisonment. I am also – have taken into consideration – whilst I will not declare it – taken into consideration the 52 days that you’ve spent in pre-sentence custody, albeit that is as a result of your parole being suspended.

It’s in those circumstances that I’ve significantly ameliorated or reduced the sentence I would otherwise have imposed for charge 2. My view is that an order in the range of six months would have been imposed had I not been dealing with the cumulative aspect. I’ve reduced that to three months in the circumstances, which will be declared cumulative to the sentence you’re currently serving.”

- [27] In the absence of any contention by the prosecution of the imposition of a cumulative order, it seems to me that the appellant was entitled to know the prospect of a cumulative sentence sought to be made against him and to be given an opportunity to reply. However, given my discussion below and the opportunity to make submissions on appeal, there is no need to finally decide the point.

Did the learned magistrate err in law by not articulating his reasons for ordering a sentence to be made cumulative?

- [28] The appellant asserts that the learned magistrate also erred by not articulating his reasons when exercising his discretion in making the order of imprisonment cumulative. I disagree.
- [29] The content and detail of reasons "will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision"¹⁴ There was an obligation on the sentencing Judge to record reasons for the imposition of a cumulative period of imprisonment, rather than a concurrent period of imprisonment,¹⁵ including where the parties had made submissions on alternative sentence structures.¹⁶
- [30] In the absence of an express statutory provision, a Judge is obliged to give sufficient reasons to identify the principles of law applied and the main factual findings relied upon by the Judge.¹⁷ This serves to properly inform the parties to understand the basis for the decision, including whether to exercise any rights to appeal, and correspondingly, reasons facilitate the role of an appellate court to discharge its statutory duty on an appeal from the decision.¹⁸
- [31] In *DL v The Queen*,¹⁹ Keane J said:

“Not every failure to resolve a dispute will render reasons for decision inadequate to justify a verdict. At one extreme, reasons for decision will not be inadequate merely because they fail to address an irrelevant dispute or one which is peripheral to the real issues. Nor will they be inadequate merely because they fail to undertake "a minute

¹⁴ *Wainohu v New South Wales* (2011) 243 CLR 181 at 215 [56].

¹⁵ *R v WBQ* [2022] QCA 48 at [19]-[20].

¹⁶ *R v Major* [2025] QCA 5, at [48].

¹⁷ Cf. *Douglass v The Queen* (2012) 290 ALR 699 at 702, [8].

¹⁸ *Justices Act 1886* (Qld), ss 222 & 223. Cf. *Douglass v The Queen* (2012) 290 ALR 699 at 702, [14].

¹⁹ *DL v The Queen* [2018] HCA 26 at [33].

explanation of every step in the reasoning process that leads to the judge's conclusion". At the other extreme, reasons will often be inadequate if the trial judge fails to explain his or her conclusion on a significant factual or evidential dispute that is a necessary step to the final conclusion. In between these extremes, the adequacy of reasons will depend upon an assessment of the issues in the case, including the extent to which they were relied upon by counsel, their bearing upon the elements of the offence, and their significance to the course of the trial." (references omitted)

- [32] To particularise the point, His Honour quoted with approval from *AK v Western Australia*,²⁰ where the High Court said:

"Ordinarily it would be necessary for a trial judge to summarise the crucial arguments of the parties, to formulate the issues for decision, to resolve any issues of law and fact which needed to be determined before the verdict could be arrived at, in the course of that resolution to explain how competing arguments of the parties were to be dealt with and why the resolution arrived at was arrived at, to apply the law found to the facts found, and to explain how the verdict followed."

- [33] Here, after formulating his acceptance of the facts, the learned magistrate regarded the offending as aggravated by the fact that the appellant was on parole at the time, for prior domestic violence matters. Although observing that the appellant's criminal history was predominantly domestic violence-related and thus somewhat different from the present offences, his Honour nonetheless noted an element of threatened violence or caused fear, particularly in the knife incident. His Honour expressed the view that, given the parole breach and the knife component, a term of imprisonment was required, with deterrence being a significant consideration. The learned magistrate reviewed the appellant's history, noting that he had previously been afforded lenient dispositions, including community-based orders and a suspended sentence, yet had continued to offend and had breached a suspended sentence twice.
- [34] Consequently, his Honour concluded that a further suspended sentence was inappropriate, as the appellant had demonstrated an inability to comply with such community-based orders. Having done so, the learned magistrate determined that imprisonment should be imposed for each offence, with the sentence for the going armed charge to be served cumulatively upon the existing paroled sentence. Applying the totality principle to avoid a crushing penalty, and taking into account but not declaring the 52 days of pre-sentence custody falling in the period of the incomplete sentence, his Honour reduced the sentence for the second charge from a notional six months to three months
- [35] Although the learned magistrate did not expressly articulate his reasons for directing that the new sentences be served cumulatively upon the existing term of imprisonment, his intention is sufficiently clear from the remarks as a whole. His Honour plainly regarded the appellant's repeated offending while subject to court orders, including prior community-based orders and a suspended sentence, as a significant aggravating factor warranting actual imprisonment. Having determined that cumulation was appropriate, the learned magistrate then carefully applied the

²⁰ *AK v Western Australia* (2008) 232 CLR 438 at 468 [85] (omitting references).

totality principle, taking into account the overall custodial burden and the 52 days of pre-sentence custody (albeit not formally declared). In order to avoid an excessively crushing penalty, his Honour substantially moderated the sentence for the more serious offence, reducing it from a notional head sentence of six months to three months. This adjustment demonstrates that the cumulative structure was tempered to ensure the aggregate period of imprisonment remained just and proportionate.

- [36] Whilst I find that the learned magistrate provided sufficient reasons for imposing a cumulative sentence, I have concluded below that the decision to impose a cumulative sentence and set the parole eligibility date at 27 December 2025 has resulted in an excessive sentence. I deal with that now.

Did the learned magistrate impose an excessive sentence having regard to the cumulative effect of the sentence and the total unbroken period of imprisonment?

- [37] The appellant argues that the sentence is manifestly excessive as a result of the imposition of cumulation with the pre-existing period of imprisonment, and having regard to the maximum penalties for charge 1 of six months imprisonment and charge 2 of two years imprisonment. The appellant maintains the submission that each term of imprisonment ought to be wholly suspended for an operational period of 12 months.
- [38] The respondent properly concedes that the sentence was manifestly excessive to the extent that the sentencing magistrate did not have regard to the total period of imprisonment of 27 months when setting the parole eligibility date, which can be remedied by substituting a parole eligibility at the date of this appeal hearing, being 19 December 2025.
- [39] As discussed above in respect of the second ground of appeal, it seems to me that the learned magistrate was acutely aware of the impact of the total period of imprisonment in making the cumulative order and ameliorated the sentences accordingly. However, on my review, the difficulty arises from the obligation to set a parole eligibility, which has resulted in an excessive sentence.
- [40] During the course of the appeal, I invited further submissions on whether the appellant committed the appeal offences during the period of a court ordered parole order that is cancelled by operation of s 209 of the *Corrective Services Act*, such that s 160B(2) of the *Penalties and Sentences Act* requires the court to set a parole eligibility date; or whether the appellant committed the appeal offences after he was released on a board ordered parole order that is cancelled by operation of s 209 of the *Corrective Services Act*, such that s 160B(3) of the *Penalties and Sentences Act* applies to require the court to set a parole release date.
- [41] Sections 160A, 160B to 160D are the only laws under which a court may make an order for the release of an offender on parole. Section 160B of the *Penalties and Sentences Act* is relevant to this appeal.
- [42] Section 160B of the *Penalties and Sentences Act* relevantly provides:

“(1) This section applies if neither section 160C nor 160D applies.

- (2) If the offender has a court ordered parole order cancelled under the Corrective Services Act 2006, section 205 or 209 during the offender's period of imprisonment, the court must fix the date the offender is eligible for parole.
- (3) If subsection (2) does not apply, the court must fix a date for the offender to be released on parole. ..."

[43] Neither s 160C nor s 160D are triggered here since the sentence is not more than three years and not a serious violent offence or sexual offence.

[44] Section 209 provides for the automatic cancellation of a "parole order" as follows:

"(1) A prisoner's parole order is automatically cancelled if the prisoner is sentenced to another period of imprisonment for an offence committed, in Queensland or elsewhere, during the period of the order.

(2) Subsection (1) applies even if the period of the parole order has expired."

[45] Relevant here, there are two species of "parole order", as defined in Schedule 4 of the *Corrective Services Act*, being "a parole order mentioned in section 194 or a court ordered parole order".

[46] Section 194 provides for the types of parole orders that may be granted by the parole board as follows:

"(1) A parole board may, by a parole order—

(a) release any prisoner on parole, if the board is satisfied that exceptional circumstances exist in relation to the prisoner; or

(b) release an eligible prisoner on parole."

[47] And a "court ordered parole order" is defined in Schedule 4 of the *Corrective Services Act* to mean "an order issued by the chief executive under s 199 in accordance with a court order under the *Penalties and Sentences Act*, section 160B(3) fixing the date for the prisoner to be released on parole."

[48] Critically here, although s 209 applies to the cancellation of both species of "parole order" (court ordered parole order and board ordered parole), s 160B(2) is engaged only in respect of a cancelled court ordered parole order, whether cancelled under s 205 or s 209 of the *Corrective Services Act*, during the offender's "period of imprisonment".

[49] The term "period of imprisonment" is defined in Schedule 4 of the *Corrective Services Act* as follows:

"Period of imprisonment means the unbroken duration of imprisonment that an offender is to serve for 2 or more terms of imprisonment, whether—

- (a) ordered to be served concurrently or cumulatively; or
- (b) imposed at the same time or different times; and includes a term of imprisonment.”

- [50] The offending subject of this appeal occurred while the appellant was on board ordered parole, and at the time of his sentence, he was serving a total unbroken period of imprisonment of two years, made up of several court outcomes.
- [51] On 1 August 2024, the Townsville Magistrates court activated an unserved period of a nine month suspended sentence imposed on 3 March 2023, which was ordered to be served cumulatively with a head sentence of six months imprisonment for the breach of wilful damage (domestic violence offence), and the court fixed a parole release date of 1 August 2024 after declaring 155 days of presentence custody. Therefore, he was then subject to a court ordered parole order.
- [52] After being released on that court ordered parole, the appellant reoffended and faced further sentencing on 31 January 2025 in the Cairns Magistrates Court when he was sentenced to an effective nine months imprisonment, cumulative upon the earlier sentence, and a parole eligibility date was set for 15 April 2024. That order was made under s 160B of the *Penalties and Sentences Act* because by operation of law, the pre-existing parole was automatically cancelled pursuant to s 209 of the *Corrective Services Act* because the appellant was then sentenced to another period of imprisonment for an offence committed, in Queensland or elsewhere, during the period of the order.
- [53] The appellant was again released, this time on board ordered parole on 19 May 2025 pursuant to s 194 of the *Corrective Services Act*. But that parole was suspended on 1 September 2025, and he was later returned to prison from 9 September 2025 because of the reoffending subject of this appeal.
- [54] So, even though the appellant was not subject to a court ordered parole when he reoffended, he nevertheless previously had a court ordered parole order made on 1 August 2024, cancelled pursuant to s 209 of the *Corrective Services Act* during the offender’s period of imprisonment, being the duration of the total unbroken period of imprisonment of two years.
- [55] Therefore, s 160B(2) of the *Penalties and Sentences Act* applies, such that the court was obliged to fix a parole eligibility date rather than a parole release date under s 160B(3) of the Act.²¹
- [56] Section 160F of the *Penalties and Sentences Act* requires that there only be one parole eligibility or release date and that date must relate to the offender’s period of imprisonment, rather than a particular term of imprisonment. The term “Period of imprisonment” is defined in Schedule 4 of the *Corrective Services Act* as the unbroken duration of imprisonment that an offender is to serve for two or more terms of imprisonment, whether to be served cumulatively or concurrently, and includes the term of imprisonment a court is imposing at the time of sentence. Even though the appellant might have been released from actual custody during the period of

²¹ Contrast *Addo v Senior Constable Jacovos* [2016] QDC 271, discussed in *Robinson v Commissioner of Police* [2023] QDC 93 at [27] but decided under s 160C.

imprisonment, this nevertheless forms part of the unbroken duration of the appellant's imprisonment. Any time spent on parole (i.e., released from actual custody) during this period does not break the continuity of the period of imprisonment.

- [57] As at the sentencing date, the appellant faced a period of imprisonment comprising the prior two year term plus the additional three months, resulting in an unbroken duration of 27 months from 28 February 2024. By then, he had already served almost 74% of this period. He has now served more than 21 months, equating to about 81% of the period of imprisonment. In these circumstances, even if a longer period in actual custody may be warranted, the appellant has served a disproportionately high proportion of his overall period of imprisonment, including 104 days in presentence custody for these offences. The new full-time expiry date of the appellant's period of imprisonment is now 10 June 2026, including the cumulative 3 months imposed by the learned magistrate on 28 October 2025.
- [58] Therefore, I am compelled to conclude that the sentence is excessive due to the learned magistrate's decision to impose a cumulative sentence and set the parole eligibility date at 27 December 2025.

Resentence

- [59] Having reached that conclusion, it is incumbent on this court to re-exercise the sentencing discretion, having regard to the matters set out above.
- [60] In these circumstances, the appellant maintains that the imposition of a cumulative sentence even with a parole eligibility date as at the date of this appeal, entrenches an excessive sentence because of the vagaries of having to apply for parole, and that the sentence for these offences should be in the order of three to six months to be served concurrently with the existing period of imprisonment, but wholly suspended for 12 months to achieve certainty of release and avoid the inordinate actual imprisonment pending the prospect of release on parole.
- [61] The respondent maintains that the appropriate course is to substitute a parole eligibility at the date of this appeal hearing, being 19 December 2025.
- [62] The only purpose for which a sentence may be imposed by virtue of s 9(1) of the *Penalties and Sentences Act* is to punish an offender to an extent or in a way that is just in all of the circumstances, facilitate avenues of rehabilitation, deter the offender and others from committing a similar offence, make it clear that the community denounces the conduct in the offending and to protect the community. The relevant factors to which the court must have regard are in the subsequent subsections of section 9 of the *Penalties and Sentences Act*.
- [63] It is trite to say that the appropriate sentence will depend on the particular circumstances of the offending and the degree of culpability of the offender. The nature of the penalty, in the form of a fine, provides little by way of rehabilitation, particularly in circumstances where its payment is likely to be unattainable and, therefore, there would be little motivation to do so. The gravity of this offending can also be gleaned by the relative maximum penalties, with due regard to the factors of general and, as appropriate, personal deterrence. For this offending, it is relevant that imprisonment should only be imposed as a last resort and a sentence that allows the appellant to stay in the community is preferable. I take into account that the appellant

has now served 104 days in presentence custody, but none of those days are declared as pre-sentence custody to provide partial cumulation with the pre-existing period of imprisonment due to expire on 5 March 2026.

- [64] In the exercise of resentencing the appellant, it seems to me that the excessive impact of the sentence will not be alleviated by maintaining a cumulative sentencing structure, which necessitates resetting the parole eligibility date by a mere eight days earlier, as at the date of this appeal. I turn to explore alternative sentencing structures.
- [65] While it is permissible to explore flexible sentencing structures that will satisfy the requirements of s 9 of the *Penalties and Sentences Act*, I am mindful of not straying to consider the appellant's prospects of securing release on parole, which is not relevant to the judicial task of sentencing.²²
- [66] By virtue of s 160A of the *Penalties and Sentences Act*, s 160B(2) will not apply if the court sentences an offender to a term of imprisonment and makes any of the following orders under this Act for the offender: an intensive correction order; a probation order mentioned in section 92(1)(b); and an order that the whole or a part of the term of imprisonment be suspended. Similarly, a parole order will not be cancelled pursuant to s 209 of the *Corrective Services Act* if the period of imprisonment is required to be served under an intensive correction order or is wholly suspended or required to be served until the court rises.
- [67] It seems to me that a wholly suspended sentence is contraindicated and not available having regard to his mature age, criminal history, that the offending involves a return in public with a knife is not less serious and limited in time and scope, poor efforts of self-rehabilitation and treatment, coupled with multiple past and persistent breaches of supervisory orders, the need for imprisonment to be imposed and supervision on release.
- [68] In my view, a probation order does not sufficiently reflect the seriousness of the offending; he has performed poorly with multiple breaches while serving past probation orders, and probation is an insufficient punishment to reflect community denunciation.
- [69] However, I am satisfied that in the circumstances of this case, the appropriate sentence on each charge of going armed so as to cause fear and public nuisance, the appellant ought be sentenced to imprisonment for six months to be served concurrently in the community by way of an intensive correction order, with convictions recorded. This would see the appellant appropriately punished by way of imprisonment, reflecting community denunciation, and satisfying a high level of supervision and rehabilitation by way of intensive probation and community service. He has not been sentenced to such an order before.
- [70] Before imposing these orders, the court requires the appellant's understanding and agreement to the requirements set out in s 114(1) of the *Penalties and Sentences Act*. Accordingly, he appeared for resentence by way of video link to the correctional facility and has expressed his understanding of the requirements of the order, his obligations and has agreed to the making of the intensive correction orders.

²² *R v Hatahet* (2024) HC 23; *R v Ponsonby* (2024) QCA 229 at [3] & [28]-[35].

Order

[71] For these reasons, I make the following orders:

1. Appeal allowed.
2. The sentence and orders of the Magistrates Court made in Cairns on 28 October 2025 are set aside.
3. The appellant is resentenced, with his understanding and agreement, as follows:
 - (a) On each charge, the appellant is to be imprisoned for a period of six months to be served concurrently with each other and concurrently with any other term of imprisonment.
 - (b) It is further ordered that the appellant will serve those terms of imprisonment as an intensive correction order with the requirements set out in s 114(1) of the *Penalties and Sentences Act 1992* (Qld).
 - (c) Convictions will be recorded for each offence.
 - (d) The appellant is directed to report to the Parole and Probation Office at Cairns within 2 business days of his release from custody.



Judge DP Morzone KC