SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lace* [2002] QCA 205
PARTIES:	**R** **v** **LACE, Allan James** (appellant)
FILE NO/S:	CA No 346 of 2001 SC No 102 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2002
JUDGES:	McMurdo P, Helman and Wilson JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal against conviction dismissed** **Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE – JURIES – DISCHARGE AND EXCUSING FROM ATTENDANCE – PUBLICITY - where appellant convicted of murder – where newspaper article discloses that appellant's prior conviction for this offence overturned by the Court of Appeal – where primary judge directed jury about article - whether primary judge should have discharged jury APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – DIRECTIONS - where appellant admitted shooting victim – where defence contended appellant did not have intention to cause the death of or grievous bodily harm to the victim – where defence contended appellant was affected by heroin and mistakenly thought the revolver was unloaded and killed the victim - whether primary judge's directions on grievous bodily harm could lead jury to conclude intention was not in doubt –where primary judge's directions made clear intention was a critical issue – where primary judge did not misdirect jury

APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – DIRECTIONS - where evidence of a recorded conversation between the appellant and others – where appellant refers to pleading guilty to manslaughter "if the worst comes to the worst" - where primary judge directed that conversation is "totally inconsistent" with appellant's explanation of an accident – where direction given while summing up evidence of the appellant's state of mind at the time of the shooting, relevant to intention - where primary judge compared the actions and statements of the appellant after the shooting to his later explanation to police and evidence at trial – where primary judge emphasised that the jury could reject judge's view of the evidence – where primary judge did not misdirect jury

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – POWER TO MAKE ORDERS AS TO TIME COUNTED AS PART OF SENTENCE - where applicant has been continuously in custody since he was first sentenced to life imprisonment on 1 November 2000 – where on 30 January 2001 appellant was sentenced to 12 months imprisonment concurrent with life sentence for offence of breaking and entering – where appeal against conviction for murder was allowed on 4 July 2001 - where primary judge declared 524 days imprisonment served during period from 9 July 1999 until 30 January 2001 as time already served under sentence – whether primary judged erred in not declaring period from 30 January 2001 until 4 July 2001 as time already served under sentence

Corrective Services Act 1988 (Qld) (repealed), s 75
Criminal Code (Qld), s 289, s 671G
Penalties and Sentences Act 1992 (Qld), s 161

R v Hally [1965] QdR 562, considered
R v H (1996) 88 ACrimR 550, considered
R v Hodgetts and Jackson [1990] 1 QdR 456, considered
R v Glennon (1992) 173 CLR 592, considered
R v Jones [1998] 1 QdR 672, considered
R v Marshall [2000] QCA 420, CA No 192 of 2000, 6 October 2000, considered
R v Maxfield [2001] QCA 123, CA No 269 of 2000, 2 April 2001, considered
R v Pilkington [2000] QCA 78, CA No 364 of 1999, 16 March 2000, considered
R v Skedgwell [1999] 2 QdR 97, applied

COUNSEL: S J Hamlyn-Harris for the appellant
B G Campbell for the respondent

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

[1] **McMURDO P:** The appellant was convicted of the murder of Margaret James on 16 November 2001. He appeals against that conviction, first, because of the refusal of the learned primary judge to discharge the jury after publication of a newspaper article and, second, because of the judicial directions and comments on the issue of intention. The appellant also applies for leave to appeal against sentence.

The newspaper article

[2] The appellant's first ground of appeal is that the learned trial judge erred in failing to discharge the jury following a newspaper article in the Courier-Mail on 6 November 2001 which disclosed that the appellant's prior conviction for this offence had been overturned by the Court of Appeal. The article, attributed to journalist Marshall Wilson, appeared on p 5 and was headed "Death choice 'offer'". It was accompanied by a 4.5x5 cm photograph of the deceased. I will set out the passage the subject of complaint in context and italicise it:

> "A DRUG dealer offered a woman associate a choice as to how she would die, a Brisbane Supreme Court jury was told yesterday.
>
> Allan James Lace, *whose conviction for murder over the same incident was set aside by the Court of Appeal in July this year,* has admitted brandishing a revolver which fired the fatal shot.
>
> It resulted in the 1999 death of Margaret James, 55, in what Lace told police was the result of a Russian-roulette-type game played as she lay in bed at her Caboolture flat."

The remainder of the short article dealt with the Crown Prosecutor's opening and is not contentious.

[3] At the commencement of the second day of the trial, the learned primary judge raised the issue. Considerable discussion with counsel in the absence of the jury ensued. After defence counsel was given an opportunity to seek instructions from his client, he applied for a mistrial because, he submitted, the article indicated that one jury had already convicted the appellant of murder in relation to the very charge for this jury's determination and that knowledge could not be erased from the jury's collective mind despite any direction from the trial judge. The learned primary judge refused the application.

[4] When the trial resumed in the presence of the jury later that day, her Honour gave the following relevant direction:

> "It is likely, in the course of this trial, to become apparent that there has been an earlier hearing in respect of this matter. Some of you may have seen some reference to it in a newspaper report. Ladies and gentlemen, you should not suppose that the evidence adduced or to be adduced in this trial or the issues to be resolved in this trial are the same. You are here to reach a verdict and you've sworn an oath

> to do so on the evidence that is presented in this trial and in this Court. And, of course, to apply the law that I'll direct you about in due course. So you'll be distracted from that task if you speculate about what occurred previously. So what happens here, in this trial, that is of concern for you."

[5] Early in her Honour's summing-up on 15 November 2001, eight days later, she reiterated:

> "Similarly, if you have heard anything about this case or similar cases, or read anything about it outside the court room, you must exclude that material from your deliberations. You may have read or heard something outside the court about the first trial. You certainly know that there was one, because it has been mentioned many times and evidence that was given at it or intended to be given at it has been referred to in the course of this trial. But it is your job to decide this charge on the evidence heard in this trial. You must not speculate about the outcome of the first trial or, indeed, why there is a retrial, because to do so will distract you from your very important task."

[6] It is not suggested these directions were in any way lacking.

[7] The appellant contends that the knowledge that another jury had previously convicted the appellant of this offence is likely to have distracted the jury from properly considering the issue of intent; the jury may have used the evidence of the appellant's prior conviction on this offence to bolster doubts as to his intention to kill or do grievous bodily harm.

[8] It is extremely undesirable and most regrettable that a report of a jury trial, which was likely to be read by at least some of the members of the jury, referred to the appellant's previous conviction by a jury of the very offence, the subject of the trial being reported. The previous conviction did not form part of the prosecutor's opening address which the article purported to report. The reference to the previous conviction placed at risk the appellant's constitutional right to a fair trial. Competent, responsible journalists must be vigilant to ensure they do not, even inadvertently, do anything to detract from that fundamental right.

[9] In *R v Glennon*[1] Mason CJ and Toohey J reminded us that the analogous situation of wrongful reception of inadmissible evidence of a prior conviction offends a deeply rooted and jealously guarded principle of our criminal law and is calculated to set the prospect of a fair trial at risk. But it is then a matter for the trial judge to decide whether it is necessary to discharge the jury in the interests of securing a fair trial and if the trial proceeds and a conviction results, for the appellate court to decide whether the accused has been deprived of a fair trial.[2]

[10] There is nothing here to suggest that the jury did not listen to her Honour's careful directions on this issue, and according to their oaths or affirmations, return an honest verdict based solely on the evidence before them. The learned primary judge's decision to refuse the application for a mistrial, and to continue the trial with

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1 (1992) 173 CLR 592.

2 At 604.

appropriate directions, did not, in my view, deprive the appellant of a fair trial and did not constitute a miscarriage of justice.

The facts

[11] The second ground of appeal requires an understanding of the evidence. At the commencement of the trial, the appellant made the following admission:

> "In the early hours of 7 July 1999 a shot was fired from a revolver that was in the hands of Alan Lace. This shot struck Margaret James' head by killing her."

[12] The prosecution case was that the appellant pulled the trigger of the revolver with the intention of causing the death of or grievous bodily harm to Mrs James. The defence case was that the appellant did not have that intention, that he was affected by heroin, that he thought the revolver was unloaded and that he mistakenly killed Mrs James whilst playing Russian roulette.

[13] Gary Mulley gave evidence that he was staying at the deceased's home on the night she was killed. He was awoken by the appellant in the early hours of that morning. The appellant went into the deceased's bedroom and woke her. Mulley entered the bedroom to offer them coffee. He noticed the deceased looked uneasy and saw a bag containing white powder, a Maglite torch, a holster and a gun and bullets on the bed. The appellant offered her some "good smack". She declined as she was tired. The appellant became agitated, aggressive, and asked if he was no longer good enough to have a shot with. He accused her of spreading rumours. She said, "Don't be silly, Badger, you're just being paranoid." He repeated the allegation and she denied it. He asked her to choose a weapon. Mulley half jokingly suggested the syringe, which is sometimes called a "weapon". The deceased was not interested. The appellant picked up the torch and bashed it in his hand a few times and shook it at her. The deceased said, "If you're going to kill me, just get it over and done with." The appellant picked up the torch, shook it in his hand and said he would bash her to death with it. He then placed it down on the bed. Mulley turned away to light a half-smoked cigarette lying in an ashtray. He heard a click, looked back and saw the appellant with a gun in his hand. The six bullets which had been on the bed were no longer there. He did not see the appellant pick up the gun or load it. The appellant was very agitated. He asked Mrs James, "Do you want to play roulette?" The appellant pointed the gun at the deceased's face at a distance of about three or four feet. Within five to seven seconds there was a loud bang and the deceased fell backwards. Mulley said, "What the f'n hell have you done, man?" and "Get an ambulance." The appellant packed his gear into his backpack and repeatedly told Mulley that he had not been there and that if he was, Mulley would be next. The appellant appeared calm, cool and collected and left the house.

[14] The appellant arrived at Andrea (Anna) Nauta's home near Beenleigh early on 7 July 1999. She knew the appellant as "Badger". He sometimes stayed in their downstairs flat to which he had a key. He came upstairs. She asked, "When did you arrive?" He said, "I've been here all night." She enquired as to the contents of the three packages wrapped in tissue paper and a clipseal plastic bag, which he was carrying. He said, "Poisons and things you don't need to know about." He asked her to get rid of one of the packages. She asked why and he said, "Well you don't need to know why. Could you just get rid of them?" He told her not to tell her boyfriend. She felt there was something hard in the package. She threw it in a dam off a dirt road near the Rum Distillery. She returned and was making a cup of tea

when the appellant again came upstairs and enquired whether she had got rid of the package. He said, "You're my alibi. You're not to tell anybody about this, that you've gotten rid of this package for me." He instructed her to say that he was at her place all night; if she did not, she would end up getting 15 years. She did not realise the appellant may have been involved in a killing until she saw the news a couple of days later.

[15] The appellant, accompanied by his girlfriend, Linda Cooper, then called on Gloria (Jean) Yorke, whom he regularly visited since 1999. She asked him why he was all dressed up. He said, "I'm – I'm going – I got to go away … I shot this old bitch and I think she's dead … anyway it'll be all on tv tonight." He did not suggest the killing was an accident.

[16] The appellant travelled north and stayed at a Marcoola motel. On 9 July 1999 he was involved in a traffic accident and was questioned by police about the killing. He denied being at the deceased's home and gave the alibi he had put in place with Anna Nauta. During a search of his motel room, a note was found addressed to "Mal" and although difficult to interpret, the appellant agreed in cross-examination that it contained rhyming slang and could be read as a message to Mal to threaten Mulley to stay away from the police or Mulley would be in trouble. The appellant was arrested for the murder of Mrs James and was remanded in custody.

[17] On 23 July 1999 the appellant's girlfriend, Linda Cooper, and another woman, Noela Budge visited him in prison. Their conversation was secretly recorded. The three discussed an acquaintance, Tia Mitchell, who had been charged with murder but who was now pleading guilty to manslaughter. One of the females noted that Tia was "looking at eight with a [indistinct] of three or seven with the two", inferentially a reference to an eight year head sentence with a recommendation for parole after three years or a seven year head sentence with a recommendation for parole after two years. The appellant said, "You know, I was thinking, worst comes to worst, right, that if the – right, doesn't fucking go MIA, right, that'd be my angle." The prosecution case was that this statement meant that if the worst happened and Mulley did not go missing in action then the appellant would concoct a story that the killing occurred in circumstances amounting to manslaughter.

[18] On 25 October 1999 Gloria (Jean) Yorke visited the appellant in prison and their conversation was also recorded. The appellant told Jean that the deceased, whom he had known her for 20 years and treated like a mother, was selling dope for him. She threatened him to obtain money and dope and he got sick of it.

[19] Ashley Hobbs, a fellow prisoner, gave evidence that the appellant believed the case against him would be dismissed at committal. He was devastated to find that Linda and Jean were giving evidence against him. He said he would have Larry Macgregor, the head of "intel" at the jail, ring the Caboolture CIB so he could give the police a concocted version of events and try to get the prosecution to accept a plea of guilty to manslaughter instead of murder. He said he would say the killing was an accident.

[20] On 25 February 2000 the appellant gave police a record of interview in which he said he visited the deceased's home early on 7 July 1999 and they were having a few laughs, a few sarcastic digs. He was affected by heroin. He unpacked his bag, including the gun which he carried for protection in his drug business. As he was at

a friend's place, he emptied out every bullet and put the gun, bullets and a bag of pot on the bed. The deceased said, "Fucking, I've had enough of the fucking gear, … Fucking wish – wish I'd just fucking die. I'm sick of using the gear." He said, "Well, pick one, you know what I mean. What'd be easier than the gear?" She pointed to the gun which he picked up, thinking it was empty. He clicked the gun at his own head playing the game of Russian roulette which they had played before. He turned the gun around and clicked it, not knowing there was a bullet in it. When he realised he had shot the deceased, he panicked, threw everything in the bag, left some drugs for Mulley and said, "Look I'm fucking out of here, mate. You know what I mean? I haven't been here" and left.

[21] The appellant gave evidence accepting his criminal history for offences of dishonesty and disclosing his association with drugs and his involvement in the drug scene. He first met the deceased in 1990. She was involved in the sale of drugs. After he was most recently released from prison he saw her every second day and he supplied her with drugs. She owed him about $2,000 for drug sales. His relationship with the deceased involved good humoured banter. He confirmed the version of events he gave to the police in the interview of February 2000. The break outside gun was old, rusty, stiff and jammed and used .45 calibre bullets.

[22] After the killing, he returned to Anna's home and dismantled the gun. Anna volunteered to dispose of it and he gave her one section of it wrapped in a bag.

[23] He has known Gloria (Jean) Yorke since 1994 or 1995. Prior to his arrest on this charge their relationship revolved around dealing in stolen property. She also supplied him with drugs. As of 7 July he owed her $16,000 for prior criminal business dealings. He and his girlfriend Linda visited Jean later that day. He told her that he had accidentally killed someone and had to get out. He and Linda then visited another friend and he finally convinced Linda to leave him. Linda travelled to the Sunshine Coast. He took a large dose of heroin which did not kill him. He then followed Linda to the Sunshine Coast where they spent the night in a motel. He returned to Brisbane to collect as much money as he could. The next morning he was arrested when he crashed their car whilst under the influence of drugs. Although he told Jean when she visited him in prison on 25 October 1999 that the deceased had blackmailed him, this was not true. He was very angry that Jean had betrayed him by secretly recording their conversation.

[24] Following a disagreement over a card game in December 1999 whilst on remand in prison in which he physically hurt Hobbs, he had nothing further to do with him; Hobbs' evidence as to their conversations was false.

[25] In cross-examination the appellant admitted he disposed of parts of the revolver. He agreed he asked Anna Nauta for a false alibi and that when he told Jean that he killed the deceased, he did not mention that it was an accident. Nor did he suggest to Jean on 25 October 1999 that the killing was an accident. He also agreed that at the first trial in October 2000 he planned to discredit Jean by giving and calling false evidence that she brought heroin into the prison for him and that he shared this heroin with others. He abandoned this plan only when he became aware that the prosecution could prove his witnesses did not share a cell with him at the relevant time. Until the committal when he became aware of the evidence against him, his defence was that he was not present at the killing. He could not recall the meaning

of his taped conversation with his girl friend, Linda, and the woman Budge on 23 July 1999.[3]

The directions on intention

[26] The appellant contends that her Honour's directions on intention, the central issue in the trial, were deficient in two respects.

(a) The direction on grievous bodily harm

[27] First, it is contended that when outlining the elements of the offence of murder her Honour misdirected the jury in the following italicised direction which I set out in context:

> "For the purposes of this trial, 'Grievous bodily harm means any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health.' *Well, that is not in doubt here*. So, before Allan Lace can be found guilty of murder, you need to be satisfied beyond reasonable doubt of three things: that Margaret James is dead; that Allan Lace killed her – that is, caused her death; and that he did so intending to cause her death or at least to cause her some serious bodily harm.
>
> It's only the last of these three that will concern you because the first two have already been admitted."

[28] In context, her Honour's comment "Well, that is not in doubt here", could not have been taken by the jury to refer to the appellant's intention to cause death or grievous bodily harm. The summing-up makes it abundantly clear that this intention was the critical issue on the charge of murder and was very much in dispute. What was "not in doubt here" was that the deceased had suffered a bodily injury within the definition of grievous bodily harm. The appellant's contention is without substance.

(b) The direction on the conversation of 23 July 2000

[29] The appellant's second contention relates to her Honour's directions to the jury about the recorded conversation between the appellant, Linda Cooper and Noela Budge at the prison on 23 July 2000, set out in para [17] of these reasons. Her Honour said:

> "You can evaluate if and how that differs from his account on 26 February[4] in the following year, and also of course his evidence before you.
>
> If you conclude … when there has been talk about Tia Mitchell pleading to manslaughter the accused says, 'That'd be my angle', and you're satisfied beyond reasonable doubt that he is referring to a plea of manslaughter if the worst comes to the worst, to use his language, that would be totally inconsistent, you might think, with his explanation of an accident."

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3 See [17] of these reasons.

4 His final record of interview with police; see [20] of these Reasons.

[30] At first blush it seems difficult to understand why the appellant's reference to a plea of guilty to manslaughter is, "if the worst comes to the worst", "totally inconsistent" with his explanation of an accident. The appellant's claim was that he did not intend to kill or injure the deceased but was playing Russian roulette with a gun which he believed, in his heroin-affected state, to be unloaded. A jury could have convicted on manslaughter if in doubt about the prosecution's proof of intent to kill or do grievous bodily harm if they were nevertheless satisfied beyond reasonable doubt that the appellant failed to use reasonable care in the use of the gun resulting in death.[5] The appellant's reference to a plea of guilty to manslaughter "if the worst comes to the worst" was in this way consistent with his explanation of accident to police on 26 February 2000 and at trial.

[31] But her Honour gave that direction in the course of summing up to the jury the evidence as to the appellant's state of mind at the time of the shooting, relevant to the element of intention. She was comparing the appellant's actions and statements after the shooting to his explanation to police on 26 February 2000 and confirmed by him in evidence at the trial. Her Honour was making the point that the appellant's conversation with Cooper and Budge, when looked at together with his previous actions and statements, may be inconsistent with *the truth of* his later explanation that the shooting was an accident.

[32] Her Honour earlier emphasised to the jury that they need not accept any view of the evidence which they perceived she held; it was their duty to reject any such perceived view which did not appeal to them and if she stressed evidence which they thought was unimportant, they must disregard that fact.

[33] I am not satisfied that her Honour's comments to the jury about the appellant's conversation with Cooper and Budge constituted an error amounting to a miscarriage of justice.

[34] I would dismiss the appeal against conviction.

Application for leave to appeal against sentence

[35] The applicant was convicted of murder on his first trial on 1 November 2000 and sentenced to life imprisonment. On 4 July 2001 the Court of Appeal allowed his appeal against that conviction but he remained in custody on remand in respect of it. He was sentenced on 30 January 2001 to 12 months imprisonment concurrent with his life sentence for the offence of breaking and entering a dwelling. It is unclear when he was charged with this offence. The applicant contends the learned primary judge erred in failing to declare under s 161 *Penalties and Sentences* Act 1992 (Qld) the period from 30 January 2001 to 4 July 2001 as time already served under the sentence.

[36] The learned sentencing judge, after adjourning the sentence to allow the applicant's counsel to make further enquiries about his pre-sentence custody, declared that 524 days be taken as imprisonment already served under the sentence: s 161 *Penalties*

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[5] Section 289, *Criminal Code*; *R v Hodgetts and Jackson* [1990] 1 QdR 456, 459. Although a verdict of not guilty to manslaughter was open, it seems unlikely a jury would regard playing Russian roulette with a gun, whilst affected by heroin, to be satisfying the duty whilst in charge of a dangerous thing to take reasonable care and precautions to avoid danger to the life, safety and health of others.

and Sentences Act 1992 (Qld). This period represents the time the appellant spent in custody between his arrest on 9 July 1999 and 27 December 1999, when he commenced to serve an unrelated sentence, then from 3 February 2000 until 7 April 2000, when he again commenced serving an unrelated sentence and from 16 April 2000 until 30 January 2001 when he commenced serving the concurrent 12 month sentence.

[37] The applicant contends that he should be given credit for the period between 30 January 2001 and 4 July 2001 which was time served for the same offence for murder on which he was again sentenced to life imprisonment after the second trial on 16 November 2001. This submission accords with justice and common sense but it is not immediately plain that this is the effect of the complex statutory sentencing regime which applies in Queensland.

[38] Section 671G *Criminal Code* provides:

> "(1) An appellant who is not granted bail shall, pending the determination of the appeal, be treated in such manner as may be directed under the laws relating to prisons."

[39] In November 2000, after his first conviction on this offence, the applicant gave notice in writing under s 75(3)(a) *Corrective Services Act* 1988 (Qld) (repealed) (the "1988 Act") that he required the Chief Executive to treat him as a prisoner serving a term of imprisonment pending his appeal. That section relevantly provides:

> "**Custody of appellants under Code**
>
> **75.(1)** In this section –
>
> **"appeal"** means an appeal under the Criminal Code, chapter 67 by a person convicted of an indictable offence whether on indictment or summarily.
>
> **"appellant"** means a person referred to in the definition "appeal".
>
> **(2)** An appellant who is detained in custody in a prison pending the determination of the appeal shall, subject to this section, be treated in accordance with the regulations as an unconvicted prisoner on remand and any appellant so treated shall, for the purpose of the Criminal Code, section 671G, be deemed to be specially treated as an appellant.
>
> **(3)** Notwithstanding the provisions of the Criminal Code, section 671G –
>
> (a) an appellant who is detained in custody in a prison pending the determination of the appeal may by notice in writing require the chief executive to treat the appellant as a prisoner serving a term of imprisonment; and
>
> (b) any time during which an appellant is treated pursuant to paragraph (a), as a prisoner serving a term of imprisonment shall, subject to any order the Court of Appeal may make or any direction it may give to the contrary in the circumstances, count as part of the appellant's sentence whether imposed by the court of trial or by the Court of Appeal."

[40] "Term of imprisonment" is relevantly defined[6] as:

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[6] 1988 Act, s 1.

"(a) the term of a single sentence; or
(b) the unbroken period of imprisonment a person is liable to serve by virtue of a number of sentences, whether ordered to be served concurrently or cumulatively and whether imposed at the same time or at different times;
…"

[41] On 1 July 2001 that Act was repealed and replaced by the *Corrective Services Act* 2000 (Qld) (the "2000 Act") which does not contain any similar provision.

[42] This was not a case where the applicant elected to be specially treated as a remand prisoner pending appeal under s 75(2) 1988 Act with the ensuing difficulty that s 671G(3) *Criminal Code* precludes time served pending appeal from being part of the sentence, subject to any direction from the Court of Appeal: cf *R v H*,[7] *R v Jones*,[8] *R v Pilkington*,[9] *R v Marshall*[10] and *R v Maxfield*.[11] In *Marshall* and *Pilkington* this Court recommended legislative intervention to avoid the peculiar result flowing from s 671G(3). It seems that the legislature heeded those recommendations by repealing s 75 1988 Act. Section 671G(3) and (3A) *Criminal Code* do not apply to this applicant, who gave notice under s 75(3)(a) 1988 Act, and was not "specially treated as an appellant under s 671G(3) *Criminal Code*."

[43] The applicant's election under s 75(3) 1988 Act to serve the period from 30 January 2001 until appeal "as a prisoner serving a term of imprisonment", absent any contrary order from this Court, means the period of imprisonment from 30 January 2001 until 4 July 2001 must "count as part of the appellant's sentence".

[44] Section 161(1) *Penalties and Sentences Act* 1992 (Qld) makes it mandatory for the offender to be given credit for time during which the offender has been held in pre-sentence custody "for the offence and no other reason". Here, the offender was, at least during the period 30 January 2001 to 4 July 2001, also serving a sentence for the offence of breaking and entering a dwelling. Section 161 therefore has no application to that period: see *R v Fox*.[12]

[45] The words "unless the sentencing court otherwise orders" in s 161(1) *Penalties and Sentences* Act 1992 (Qld) mean that the section is not an exhaustive statement or complete code of a sentencing courts power to take account of a period of pre-sentence custody when arriving at an appropriate sentence. Section 161 does not limit or exclude the general sentencing discretion to consider a period of custody served before sentence but outside the scope of s 161 as a mitigating factor: *R v Skedgwell*.[13] As the applicant was convicted of murder, the sentence cannot be mitigated: *Criminal Code*, s 305.[14] The period of custody served by the applicant for the offence of murder will, however, determine his eligibility for post-prison community based release: 2000 Act, s 135(2)(b). That period must include the

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7 (1996) 88 ACrimR 550.
8 [1998] 1 QdR 672
9 [2000] QCA 078; CA No 364 of 1999, 16 March 2000.
10 [2000] QCA 420; CA No 192 of 2000, 6 October 2000.
11 [2001] QCA 123; CA No 269 of 2000, 2 April 2001.
12 [1998] QCA 121; CA No 50 of 1998, 12 June 1998.
13 [1999] 2 QdR 97.
14 Nevertheless, ss 158 and 161 *Penalties and Sentences Act* 1992 (Qld) apply to the offence of murder: *R v Blake* [1995] 2 QdR 167, 169-170.

period from 30 January 2001 until 4 July 2001 as it was "part of the appellant's sentence".[15]

[46] Whilst this period[16] could neither be the subject of a declaration under s 161 *Penalties and Sentences Act* 1992 (Qld) nor a reason for decreasing the mandatory life sentence, it remains time served as a term of imprisonment for the offence of the murder of Margaret Rose James on 7 July 1999 because of the election made by the appellant in November 2000 under s 75(3)(b) 1988 Act. This is not inconsistent with Part 9, *Penalties and Sentence Act* 1992 (Qld) but complements it by making provision for what would otherwise be a gap in the legislative scheme.

[47] The applicant has not, however, demonstrated that her Honour's declaration under s 161 *Penalties and Sentences Act* 1992 (Qld) was wrong.

[48] The application for leave to appeal against sentence should be refused.

[49] I would dismiss the appeal against conviction and refuse the application for leave to appeal against sentence.

[50] **HELMAN J:** I agree with the orders proposed by the President and generally with her reasons, but on the questions raised in relation to the sentence I agree with Wilson J.

[51] **WILSON J:** The appeal against conviction should be dismissed for the reasons given by the President.

[52] The application for leave to appeal against sentence was made on the ground that the sentencing judge erred in failing to declare the period from 30 January 2001 to 16 November 2001 as time already served under the sentence.

[53] The murder was committed on 7 July 1999. The appellant was arrested two days later. He was convicted on 1 November 2000, and sentenced to life imprisonment. On 20 November 2000 he appealed against the conviction, and at the same time gave notice pursuant to s 75(3) of the *Corrective Services Act* 1988 that he required his pre-appeal custody to be counted as time under the sentence. On 4 July 2001 the Court of Appeal set aside the conviction and ordered a retrial. He was remanded in custody. On 16 November 2001 he was again convicted and sentenced to life imprisonment.

[54] The appellant has been continuously in custody since he was first sentenced to life imprisonment. For some of the time he was serving sentences for other offences. The judge who sentenced him after the retrial made a declaration under s 161 of the *Penalties and Sentences Act* 1992 that a total of 524 days of presentence custody be days served under the sentence.

[55] For present purposes it is relevant that on 30 January 2001 the appellant pleaded guilty to charges of breaking and entering and stealing, and was sentenced to terms of twelve months and six months to be served concurrently with his then existing life sentence. On the hearing of the present appeal, his counsel conceded that the

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15 Section 75(3), 1988 Act.

16 This is so at least until 1 July 2000 when the 1988 Act was repealed. The applicability of any transitional provisions has not yet been argued before this Court.

sentencing judge had been correct in refusing to make a declaration under s 161 in relation to the period from 30 January 2001 to 16 November 2001.

[56] However, he submitted that the period from 30 January 2001 to the determination of the first appeal (on 4 July 2001) was to be counted as part of his sentence even though s 161 was not applicable to it. There was no application before this Court for a declaration to that effect. However, counsel seemed to be asking for some informal expression of opinion to that effect, which might be of assistance to the appellant in the future in calculating the point at which he is eligible to apply for post-prison community based release.

[57] The proper construction of s 671G(3) of the *Criminal Code* and s 75 of the *Corrective Services Act* 1988 and the effect of the repeal of the latter as from 1 July 2001 were not fully argued. None of the decided cases of which I am aware[17] dealt with a situation such as the present where the first conviction was set aside and there was a retrial which produced the same result as the first trial. There was no argument upon whether the "term of imprisonment under the appellant's sentence" in s 671G of the *Code* can refer to a sentence imposed after a retrial and or whether "the appellant's sentence, whether imposed by the court of trial or by the Court of Appeal" in s 75(3) of the *Corrective Services Act* 1988 can include a sentence imposed after a retrial.

[58] In all the circumstances I am not prepared to join in the expression of opinion requested.

[59] The application for leave to appeal against sentence should be dismissed.

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[17] *R v Jones* [1998] 1 Qd R 672; *R v Hally* [1965] Qd R 562; *R v H* (1996) 88 A Crim R 550; *R v Maxfield*, [2001] QCA 123, CA No 296 of 2000, 2 April 2001; *R v Marshall* [2000] QCA 420, CA No 192 of 2000, 6 October 2000; and *R v Pilkington* [2000] QCA 78, CA No 364 of 1999.