SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kunst* [2002] QCA 400
PARTIES:	**R** **v** **KUNST, Carey Bruce** (applicant)
FILE NO/S:	CA No 120 of 2002 SC No 451 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2002
JUDGES:	McPherson and Jerrard JJA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – OFFENCES COMMITTED WHILE ON BAIL OR PROBATION AND EFFECT OF BREACH OF PROBATION – s 161(1) Penalties and Sentences Act – time served for offence and "for no other reason" – whether open to judge to decline to give credit for pre-sentence custody where custody was due to breach of bail CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – RECOGNISANCES, PROBATION AND OTHER NON-CUSTODIAL ORDERS – PROBATION ORDERS AND SUSPENSION OF SENTENCE – DISCRETION OF COURT – prisoner apprehends unlikely to receive parole due to criminal history – whether trial judge erred in failing to order the sentence be suspended based upon this apprehension *Penalties and Sentences Act* (Qld), s 161(1) *R v Jones* [1998] 1 Qd R 672, referred to

R v Marshall [1993] 2 Qd R 307, followed
R v Skedgwell [1999] 2 Qd R 97, referred to

COUNSEL: B G Devereaux for the applicant
L J Clare for the respondent

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

[1] **McPHERSON JA:** On 22 March 2000 the applicant pleaded guilty and was sentenced to imprisonment for three years, with a recommendation for release after 12 months, to charges of supplying a dangerous drug on five different occasions between 29 August and 19 September 2000. His first complaint is that the prospect that effect will be given to that recommendation is, in practical terms, so slight that the sentencing judge ought to have acknowledged his pleas of guilty by suspending the sentence rather than making the recommendation for parole. Having regard, however, to the applicant's extensive record of previous offending, it would have been open to his Honour to impose a more extensive head sentence than imprisonment for three years for those offences, so that there is in the end no justification for characterising the penalty imposed as excessive.

[2] Failing that, it is submitted on his behalf that his Honour wrongly omitted to recognise a period of pre-sentence custody that ought, it is said, to have been taken into account by way of deduction under s 161(1) of the *Penalties and Sentences Act* as time already served under the sentence imposed. His Honour deducted 32 days spent in pre-sentence custody, but not a further period of 86 days to which the applicant claimed to be entitled under that provision. Section 161(1) provides:

> "**161 Time held in pre-sentence custody to be deducted.**
> (1) If an offender is sentenced to a term of imprisonment for a offence, any time that the offender was held in custody in relation to proceedings for the offence and for no other reason must be taken to be imprisonment already served under the sentence, unless the sentencing court otherwise orders."

[3] In exercising the discretion conferred by the final words of s 161(1) of ordering otherwise, his Honour said:

> "The problem that I have with that submission is that there has been a repetitive pattern while on bail for this offence of committing other offences, spending time in custody, being released and so on. In principle one would not see why in those circumstances there should be any substantial alleviation of the period in custody for those reasons."

The pattern of re-offending described in his Honour's remarks is set out in detail in the reasons of Jerrard JA on this application for leave to appeal against sentence. Even now, it is perhaps not easy to trace with complete confidence each of the credits to which the applicant claims to have been entitled under s 161(1) of the Act. Mr Devereaux's submission on his behalf is, however, that his Honour was bound to give effect to s 161(1), and that it was in the circumstances disclosed here a

wrong exercise of discretion to order otherwise by declining to deduct the whole further period of 86 days, if that is what it was, of pre-sentence custody as time already served under the sentence later imposed in respect of the five offences in question.

[4] What s 161(1) requires is that the time for which the offender was held in custody "in relation to proceedings for the offence" be treated as imprisonment already served under the sentence imposed if that custody was "for no other reason" than those proceedings. On one view, that would be so if bail is revoked and the offender is returned to custody pending proceedings for that offence. Such a case would, Mr Devereaux urged, be no different if the offender had never applied for bail at all but had simply remained in custody without bail. I was at first impressed with this submission; but, on reflection, I think it is not correct. Section 161(1) uses the expression "for no other reason", and not "for no other offence". Breaching the conditions of one's bail is a reason for being held in or returned to custody, even if that custody is in relation to proceedings for one and the same offence. If s 161(1) had been intended to apply to a case like the present, it would have been simple and natural enough for it to have said specifically that time in custody in relation to proceedings for the offence "and for no other offence" (rather than reason) was to be taken to be imprisonment already served under the sentence. But that is not what it says, and there is no compelling reason for reading it in that more limited way.

[5] It follows in my opinion that it was open to the learned sentencing judge to order otherwise, as he did, by declining to give credit for the full period of pre-sentence custody by deducting it from the time to be served under the sentence imposed; and to do so for the reason, which was not disputed, that the applicant's bail had been revoked because of his commission of further offences while on bail for the five offences of which he was convicted and sentenced on 22 March 2000. I therefore agree with Jerrard JA that the applicant's re-offending conduct was relevant to exercising the discretion granted by s 161(1), and that neither *R v Jones* [1998] 1 Qd R 672 nor *R v Skedgwell* [1999] 2 Qd R 97 compels a contrary conclusion. In the ordinary way, however, I would expect the deduction envisaged by s 161(1) to be given effect. It is not intended as a procedure for punishing breaches of the conditions of bail.

[6] I would dismiss the application for leave to appeal against sentence.

[7] **JERRARD JA:** On four occasions between 28 August 2000 and 20 September 2000 Carey Bruce Kunst unlawfully supplied methyl-amphetamine to an undercover police officer. On the first three occasions he was paid $1,000.00 for providing amounts of approximately a quarter of an ounce (respectively 6.901 grams, 6.464 grams, and 6.895 grams of powder with a purity of 25.4, 23.4 and 37.8%) to that officer. On 19 September 2000 he provided 13.66 grams of white powder with a purity of 19.6% for which he was paid $1,800.00. On 22 March 2002 he pleaded guilty to four counts of unlawfully supplying that dangerous drug to another person, and to a further and less important count of having unlawfully supplied cannabis to that police officer on 29 August 2000. He was sentenced to three years imprisonment, and the learned sentencing judge recommended that he be considered for release on parole after he had served 12 months of the sentence. The learned judge directed that 32 days of a period already spent in custody be taken to be time already served, those being the days between 18 February 2002 and the date of sentence.

[8] Mr Kunst has appealed against that sentence. The outline of submissions on his behalf makes no complaint about the sentence of three years imprisonment, but contends that there were two periods clearly attributable only to the offences for which he was sentenced and which ought to have been declared to be time served under the sentence, and which were not. Those were the period from 29 April 2001 until 7 June 2001 (39 days), and a further period between 5 December 2001 and 21 January 2002 (47 days). It is submitted that that total of 86 days ought to have been declared time served pursuant to s 161 of the *Penalties and Sentences Act* 1992 (Qld).

[9] It was common ground before the learned sentencing judge that the "head" sentence of three years imprisonment was an appropriate one in light of the sentences imposed in other matters to which the learned judge was referred. That part of the sentence is not under attack in these proceedings. It was submitted however, that the applicant's criminal history, and his offending while on bail, would probably mean that his prospect of obtaining parole as recommended was negligible, and it was submitted that it would accordingly be appropriate to order instead that the three years imprisonment be suspended after the applicant had served 12 months of that sentence. Those submissions require some consideration of the applicant's criminal history and offending while on bail, and the reasons why the learned trial judge did not declare the 86 days about which complaint is made as being time already served.

[10] The applicant was first taken into custody on these matters on 29 April 2001. It seems that he had been arrested at the end of the investigation in September 2000, and had been difficult to locate until taken into custody in late April 2001. What happened thereafter appears to be as follows:

- Between 29 April 2001 and 7 June 2001 he was in custody on the charges on which he was sentenced on 22 March 2002, and (apparently) also on a charge of failing to appear and answer his bail on 27 April 2001.

- He was released on bail on 7 June 2001. The charge with respect to failure to appear on bail seems to have been forgotten about or abandoned at some later stage.

- On 19 September 2001 he was arrested and returned to custody on other charges, most of which were committed after his recent release on bail.

- On 18 October 2001 he was sentenced to imprisonment for one month in respect of those offences, and released from custody that same day. The period between 19 September 2001 and 18 October 2001 was taken into account as time already served.

- On 16 November 2001 a warrant was issued by this Court ordering the apprehension of Mr Kunst, following an application made by the Director of Public Prosecutions, on which application was established that Mr Kunst was not living at the address supplied by his solicitors to the Director of Prosecutions. That conduct was a breach of the *Bail Act* 1980 (Qld) (apparently not thereafter prosecuted).

- On 5 December 2001 the applicant was returned to custody and held in custody solely on the instant charges.

- On 21 January 2002 further charges were laid against him, alleging criminal offences committed by him after his release from custody on 18 October 2001. He was accordingly held in custody on those other charges (of unlawful use of a motor vehicle and stealing) from 21 January 2002, as well as on the offences of supplying amphetamines.

- On 5 February 2002 he was sentenced to 14 days imprisonment for those offences last committed whilst on bail, and that sentence ended on 18 February 2002.

[11] This sorry history of offending whilst on bail was accurately described by the learned sentencing judge as being:

> "… a repetitive pattern while on bail for this offence of committing other offences, spending time in custody, being released and so on."

It was that repetitive pattern which led His Honour to observe that in principle the learned judge could not see why in those circumstances there should be any substantial alleviation of the period the applicant had spent in custody. Accordingly the learned judge specifically ordered that the 32 days most recently spent in custody be taken into account as time already served, but not the further 86 days in which he was (probably) in custody by reason solely of these offences, namely between 29 April 2001 and 7 June 2001 in the first period, and 5 December 2001 and 21 January 2002 in the second period. In respect of that total of 86 days the learned sentencing judge "otherwise ordered" within the meaning of s 161(1) of the *Penalties and Sentences Act*.

[12] The applicant has a significant criminal history. He has been convicted of assault occasioning bodily harm, dangerous driving, wilful damage to property, unlawful possession of motor vehicles, and stealing on various appearances in courts since March 1983, and had been previously sentenced on four separate occasions for offences involving drugs. When on bail on two separate periods in respect of these offences, he committed other offences.

[13] If the applicant had been continuously in custody since 29 April 2001 until 22 March 2002 on the offences for which he was sentenced, it would have been appropriate to declare that that whole period was imprisonment already served under a sentence of imprisonment imposed in March 2002. So much is established by *R v Marshall* [1993] 2 Qd R 307 as a general proposition, and then by s 161, subject to a discretion to order otherwise. Further, Mr Kunst has been punished for the offences committed on bail. However, a sentencing court has a discretion pursuant to s 161(1) to order otherwise than that time spent in custody awaiting sentence be declared imprisonment already served under that sentence subsequently imposed, and I think the sentencing remarks of the learned judge correctly identify the circumstances of the present case as one in which in principle it is appropriate so to order otherwise. This is because the conduct of a person in the applicant's position makes it clear that his detention in custody awaiting sentence was at all times necessary to forestall re-offending behaviour on his part. In actuality, there was always an unacceptable risk that he would re-offend if on bail. Both times he was granted bail he did re-offend.

[14] That latter conduct of his meant that the sentencing judge was entitled to have the view that it was the applicant's conduct of re-offending whilst on bail which

explained his detention on pre-sentence custody, and this was conduct **other** than the conduct for which he was originally held in custody in April 2001 and for which he was being sentenced on 22 March 2002. That other conduct is relevant to the discretion granted by that subsection. I differ from the submission ably presented by counsel that the discretion granted in s 161(1) was wrongly exercised by taking into consideration the reasons for not getting bail. I do not understand the judgments of this Court, in either *R v Skedgwell* [1999] 2 Qd R 97 or in *R v Jones* [1998] 1 Qd R 672 or *R v Holton* [1998] 1 Qd R 667 or even *R v Marshall* (supra), inevitably compel the exercise of a discretion, either statutory or general, in the applicant's favour in this situation.

[15] That being so, I think it was appropriate in principle for the learned judge to determine that that time spent in pre-sentence custody not be declared imprisonment already served under the sentence imposed. The applicant might say that that analysis could not apply to the period from 29 April 2001 to 7 June 2001, that being time spent in custody and before he re-offended on bail. The learned judge might well have declared those 39 days time already served, but I observe that he did declare as time already served the 32 days between 18 February 2002 and 22 March 2002. The learned judge would have been entitled to refuse to make that declaration about that 32 day period.

[16] The applicant also asked that the recommendation for consideration for release on parole after serving one year be replaced by an order suspending his sentence after he had served one year. The grounds were an apprehension that post prison community based release ("parole") would not be granted to him, given his re-offending history. That apprehension may be valid but it is **not** a reason for deciding a suspended sentence is appropriate. The provisions of Part 8 of the *Penalties and Sentences Act* do not encourage or permit suspension of a sentence because grounds for release on parole do not exist.

[17] Accordingly, I would dismiss the application for leave to appeal against sentence.

[18] **WILSON J**: I have read the reasons for judgment of McPherson and Jerrard JJA.

[19] The applicant's criminal history (both before and after the offences in question) was a relevant consideration in fixing the sentence, which comprised the head sentence of three years, the recommendation for eligibility for parole and the direction that 32 days' presentence custody be taken into account as time already served.

[20] It is true that penalties had already been imposed for the offences committed whilst on bail. But in saying -

> " .... there has been a repetitive pattern while on bail for this offence [of] committing other offences, spending time in custody, being released and so on. In principle one would not see why in those circumstances there should be any substantial alleviation of the period in custody for those reasons"

the learned sentencing judge was neither signalling an intention to, in effect, impose any greater penalties for those other offences nor signalling an intention to, in effect, impose penalties for breaches of the *Bail Act 1980*. Rather he was saying no more than that the applicant's pattern of criminal behaviour warranted his not

directing that more than 32 days' pre-sentence custody be deemed time already served under the sentence; that is, it warranted his "ordering otherwise" within s 161 of the *Penalties and Sentences Act 1992*. I can see no error of principle in that approach.

[21] For the reasons expressed by McPherson and Jerrard JJA, the application for leave to appeal should be dismissed.