

SUPREME COURT OF QUEENSLAND

CITATION: *R v Laing* [2003] QCA 477

PARTIES: **R**
v
LAING, Sharee Ann
(applicant)

FILE NO/S: CA No 254 of 2003
DC No 1353 of 2002
DC No 1589 of 2003

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED EXTEMPORE ON: 3 November 2003

DELIVERED AT: Brisbane

HEARING DATE: 3 November 2003

JUDGES: McMurdo P, Davies JA and Mullins J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

- 1. Grant the application for leave to appeal against sentence**
- 2. Allow the appeal and set aside the sentences imposed for the offences on indictment 1353 of 2002**
- 3. In lieu of the sentence for the count of grievous bodily harm that was imposed by the learned sentencing judge, sentence the applicant to a term of three and one half years' imprisonment with a recommendation that the applicant be eligible for post prison community based release after serving a period of 14 months**
- 4. In lieu of the sentence that was imposed for the offence of dangerous operation of a motor vehicle with a circumstance of aggravation, sentence the applicant to a term of 15 months' imprisonment**
- 5. In respect of both these terms of imprisonment declare that the 124 days spent in pre-sentence custody comprising 64 days between 9 March 2001 and 11 May 2001 and comprising 60 days between 2 June 2003 and 31 July 2003 be declared time already served under these two sentences**
- 6. Order that these sentences be concurrent with the**

**sentence imposed on 31 July 2003 for unlawful use
of a motor vehicle and the suspended sentence that
was also activated on that day**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – where applicant sentenced to terms of imprisonment on two separate indictments – where all terms imposed to be served concurrently – where applicant spent 124 days in pre-sentence custody in respect of offences on one and not the other indictment – where learned sentencing judge did not make a declaration under s 161 *Penalties and Sentences Act* but took that period into account in fixing the time for eligibility for parole – where learned sentencing judge considered that the making of a declaration under s 161 in respect of offences on one indictment would have precluded making concurrent the term of imprisonment imposed for the offence on the other indictment and the activated suspended sentence – sentences do not require the same start date to be concurrent – error of principle – applicant re-sentenced – declaration as to pre-sentence custody made

COUNSEL: The applicant appeared on her own behalf
C Heaton for the respondent

SOLICITORS: The applicant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the
respondent

MULLINS J: The applicant, who is unrepresented, applies for leave to appeal against the sentences imposed on her on 31 July 2003. The applicant pleaded guilty to one count of unlawfully using a motor vehicle which was committed in October 1996. The applicant also pleaded guilty to offences on another second indictment, namely one count of grievous bodily harm and one count of dangerous operation of a motor vehicle with a circumstance of aggravation, which offences were committed on 9 March 2001 during the operational period of a suspended sentence of six months that was imposed on the applicant on 30 July 1999.

The applicant was sentenced for six months' imprisonment for the unlawful use of a motor vehicle. The applicant was sentenced to three and one half years' imprisonment for the grievous bodily harm count and 15 months' imprisonment for the dangerous operation count. The suspended term of imprisonment of six months was wholly activated. All terms of imprisonment were ordered to be served concurrently. A recommendation was made that the applicant be considered for post prison community based release after serving 14 months.

The applicant, in her submissions, sought a reduction in the time fixed for that recommendation from 14 months to 12 months and also sought that a suspended sentence be imposed in lieu of the recommendation for release on parole.

The applicant was born on 31 July 1979. She engaged in prostitution and was a user of heroin from the age of 15 years. Her extensive criminal history, which includes offences of prostitution, dishonesty, drug offences and unlawful use of a motor vehicle, breaches of orders imposed by the Court and breach of bail orders commenced from the time she was 15.

The offence for which the applicant was sentenced in the District Court on 30 July 1999 was dangerous operation of a vehicle whilst adversely affected by an intoxicating substance with previous convictions under section 328A (3)(b) of the Criminal Code. The only prior conviction for an offence of violence which the applicant had was in the Magistrates Court

in January 1998 for assaulting a police officer in the performance of his duty for which the applicant was fined.

The circumstances of the offences on 9 March 2001 were that the applicant's husband did a drug deal in the back of the car with the complainant and her boyfriend which was meant to be a purchase of amphetamines by the applicant's husband. The complainant and her boyfriend left the car, but shortly afterwards the applicant and her husband pulled up in the car by the complainant and her boyfriend and an allegation was made that the substance was not amphetamine.

The applicant got out of the car and ran towards the complainant and struck her in the face with a knife. The applicant returned to the car and she and her husband drove off. The complainant's cheek was cut for a length of about nine to 10 centimetres and the wound required 30 stitches. The complainant has been left with significant scarring and her left lower lip now hangs lower. The complainant described the injury as being emotionally devastating for her.

Later on that same morning the police attended at the complex where the applicant and her husband resided. The applicant's husband was driving their car and the applicant was in the front seat as a passenger. The car was stopped at the gate of the complex when seen by the police. On the police calling out, the applicant urged her husband to drive and put the car into drive. The police officer had to jump aside in order to avoid being crushed. The applicant and her husband drove a

short distance, but then stopped and they were both taken into custody.

The applicant has subsequently separated from her husband. She has two young children from that relationship who are being cared for by her mother as a foster carer while the applicant is in custody. The psychological report that was tendered before the learned sentencing Judge reported on the applicant's relationship with her husband as being marked by violence and abuse.

The applicant spent 124 days in pre-sentence custody in respect of the offences on the second indictment. No declaration was made under section 161 of the Penalties and Sentences Act 1992 but the learned sentencing Judge took that period of time into account in fixing the time for eligibility for post prison community based release.

In the course of the submissions on sentencing the learned sentencing Judge did consider whether a declaration could be made under section 161 in respect of that period in pre-sentence custody. Because that pre-sentence custody was in respect of the offences on the second indictment, the learned sentencing Judge was concerned that if he made a section 161 declaration he could not order that the other sentences that would take effect from that day of sentencing, for the activation of the suspended sentence and the sentence for the count on the separate indictment of unlawful use of a motor

vehicle, be concurrent with the sentences to which the section 161 declaration could apply.

Sentences do not require the same start date to be concurrent sentences under section 155 of the Penalties and Sentences Act 1992. Under section 161 subsection (1) a declaration must be made in respect of pre-sentence custody where it applies unless the Court otherwise orders. There was no decision made by the learned sentencing Judge for reasons that could be justified under section 161 subsection (1) for not making the pre-sentence declaration in respect of the two offences to which that pre-sentence custody applied. There was therefore an error in principle made by the learned sentencing Judge which means that the applicant must be re-sentenced on this application.

The head sentence that was imposed by the learned sentencing Judge for grievous bodily harm was not contended by the applicant to be outside the appropriate range for the offence having regard to the circumstances in which the applicant committed it. It was a gratuitous and vicious attack upon the complainant without warning which has left the complainant disfigured.

A question which arose on the hearing of the application today was whether the recommendation that was made by the learned sentencing Judge for release on parole should be substituted with an order that the sentence be suspended after the same period of time.

There is no error which can be shown in the decision that the learned sentencing Judge made to apply a recommendation for early release on parole over a suspended sentence. I would therefore not be inclined to revisit that aspect of the learned sentencing Judge's sentencing.

The orders which I would make are:

- (1) grant the application for leave to appeal against sentence;
- (2) allow the appeal and set aside the sentences imposed for the offences on indictment 1353 of 2002;
- (3) in lieu of the sentence for the count of grievous bodily harm sentence the applicant to a term of three and one half years' imprisonment with a recommendation that the applicant be eligible for post prison community based release after serving a period of 14 months;
- (4) in lieu of the sentence that was imposed for the offence of dangerous operation of a motor vehicle with a circumstance of aggravation, sentence the applicant to a term of 15 months' imprisonment;
- (5) in respect of both these terms of imprisonment declare that the 124 days spent in pre-sentence custody comprising 64 days between 9 March 2001 and 11 May 2001 and comprising 60 days between 2 June 2003 and 31 July 2003 be declared to be time already served under these two sentences;
- (6) order that these sentences be concurrent with the sentence imposed on 31 July 2003 for unlawful use of a

motor vehicle and the suspended sentence that was also activated on that day.

THE PRESIDENT: I agree.

DAVIES JA: I agree.

THE PRESIDENT: The orders are as proposed by Justice Mullins.
