

SUPREME COURT OF QUEENSLAND

CITATION: *R v Sinden* [2004] QCA 165

PARTIES: **R**
v
SINDEN, Derek
(applicant)

FILE NO/S: CA No 163 of 2000
DC No 3109 of 1999
DC No 3739 of 1999
DC No 177 of 2000
DC No 1320 of 2000
DC No 1321 of 2000

DIVISION: Court of Appeal

PROCEEDING: Application for Reopening (Criminal)

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 17 May 2004

DELIVERED AT: Brisbane

HEARING DATE: 17 May 2004

JUDGES: McMurdo P and Chesterman and Atkinson JJ
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **The Court declares that the period of time during which the applicant was in custody pending the determination of his appeal from 22 June 2000 to 2 October 2000, a period of 94 days, is to count as time served under the sentence of imprisonment of seven years which he was ordered to serve on 26 May 2000.**

CATCHWORDS: CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – OTHER MATTERS – QUEENSLAND – application for pre-sentence custody to be declared time served under a sentence – where applicant elected to be treated as "unconvicted prisoner on remand" under s 75 and s 76 of the *Corrective Services Act* 1988 pending determination of appeal – where lost appeal and did not seek such a declaration – where this meant time served pending appeal not counted as time towards sentence – where Court's power under the *Criminal Code* to so declare now removed – whether Court could grant declaration under the slip rule

Corrective Services Act 1988 (Qld), s 75, s 76
Criminal Code 1899 (Qld), s 651G(3)

R v Jones [1998] 1 Qd R 672, cited

COUNSEL: S Ryan for the applicant
M J Copley for the respondent

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

THE PRESIDENT: The applicant seeks a declaration that the period of time during which the applicant was in custody pending the determination of his appeal from 22 June 2000 to 2 October 2000 is to count as time served under the sentence of imprisonment of seven years which he was ordered to serve on 26 May 2000.

He was convicted after a trial on 26 May 2000 of entering a dwelling house with intent to commit an indictable offence, robbery with personal violence and entering a dwelling house and stealing. He was sentenced to seven years imprisonment and a declaration was made that 395 days of presentence custody count as time served under the sentence.

He appealed against his conviction and sought leave to appeal against the sentence. On 22 June 2000 the applicant completed a form whilst in custody indicating that he wished to be treated as an "unconvicted prisoner on remand" under s 75 and s 76 of the *Corrective Service Act 1988 (Qld)* pending the determination of his appeals. He believed that his election to be treated in this way would allow him to stay at the Arthur Gorrie Correctional Centre where he was imprisoned.

He did not understand that this would have the effect under s 671G(3) *Criminal Code* that the period of imprisonment then spent pending appeal would not ordinarily be counted as a term of imprisonment unless the Court of Appeal ordered otherwise. His appeal was dismissed and his application for leave to appeal against sentence was refused: see *R v Sinden* [2000] QCA 408; CA number 163 of 2000, 2 October 2000.

The Court of Appeal has made a declaration of the type sought in like circumstances in the past: see, for example, *R v Jones* [1998] 1 QdR 672, 678. One difficulty is that s 671G(3) *Criminal Code* as it stood at the time of the election made by the applicant has been repealed so that the Court no longer has power under s 671G to make the order sought. There is little doubt, however, that this Court does have power to make the declaration correcting its order under the slip rule. Mr M J Copley who appears for the respondent does not oppose the making of the declaration. It should be made.

I would make the following order:

The Court declares that the period of time during which the applicant was in custody pending the determination of his appeal from 22 June 2000 to 2 October 2000, a period of 94 days, is to count as time served under the sentence of imprisonment of seven years which he was ordered to serve on 26 May 2000.

...

THE PRESIDENT: That is the order of the Court.