SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cannon* [2005] QCA 41
PARTIES:	**R** **v** **CANNON, Charles Edward** (applicant/appellant)
FILE NO/S:	CA No 293 of 2004 DC No 263 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	28 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2005
JUDGES:	McMurdo P, Williams JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Grant the application for leave to appeal against sentence** **2. Allow the appeal against sentence** **3. Vary the sentence imposed at first instance by deleting the order that the term of imprisonment be suspended after serving a period of 12 months imprisonment to an order that the term of imprisonment be suspended forthwith and by deleting the order that the sentence be served cumulatively**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – GENERALLY – where applicant convicted for home invasion offences and sentenced to a period of imprisonment – where applicant subsequently convicted after trial of attempting to procure the commission of a criminal act and sentenced to two years imprisonment to be suspended after serving 12 months – where that sentence to be served cumulatively on sentence for home invasion offences – where sentence for home invasion offences subsequently set aside – where applicant served 304 days pre-sentence custody on remand for offence of

attempting to procure the commission of a criminal act and other offences – where that pre-sentence custody was not taken into account by sentencing judge – where applicant served approximately 100 days of sentence imposed – whether pre-sentence custody should be taken into account – whether sentence manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 161

R v Ainsworth [2000] QCA 163; CA No 26 of 2000, 5 May 2000, applied
R v Skedgwell [1999] 2 Qd R; [1988] QCA 93; CA No 434 of 1997, 15 May 1988, applied

COUNSEL: C Reid for the applicant
R G Martin SC for the respondent

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

[1] **McMURDO P:** Mr Cannon was convicted after a trial in the District Court at Maroochydore on 4 August 2004 of attempting to procure the commission of a criminal act. The next day he was sentenced to two years imprisonment to be suspended after serving 12 months with an operational period of two years, the sentence to commence at the conclusion of another sentence imposed on 26 February 2004. Mr Cannon was then serving the latter sentence for offences arising out of what is best described in short form as a home invasion. The home invasion convictions were subsequently set aside and a new trial ordered by this Court on 19 November 2004[1] so that the cumulative nature of the learned sentencing judge's order now has no effect.

[2] Mr Cannon's counsel, Mr Reid, contends that the sentence imposed on 5 August 2004 is manifestly excessive. This contention turns on the weight given by the learned sentencing judge to Mr Cannon's pre-sentence custody in light of the overturning of his conviction on the home invasion offences. These changed circumstances suggest that this matter would have best been dealt with by way of a re-opening under s 188 *Penalties and Sentences Act* 1992 (Qld) before the learned sentencing judge but because the matter has been prepared as an application for leave to appeal against sentence all parties agree that the most appropriate course is for this Court to now deal with it.

[3] Mr Cannon was jointly charged with Andrew Paul Chapman, who pleaded guilty on the morning of trial. The learned judge sentenced Chapman to two years imprisonment to be suspended after serving eight months, also with an operational period of two years.

[4] The facts of the offence were as follows. Mr Cannon and Mr Chapman were long standing acquaintances. Mr Chapman alleged that the complainant perpetrated an armed robbery with actual violence upon him and that the complainant was in possession of a significant amount of property or money belonging to Mr Chapman.

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1 *R v Cannon* [2004] QCA 440; CA No 74 of 2004, 19 November 2004.

Instead of making a complaint to police, Mr Cannon and Mr Chapman agreed that Mr Cannon would use a "heavy" to attack the complainant so that Mr Chapman's property or money would be returned. The plan was exposed because Mr Cannon was being covertly monitored by police in respect of other matters.

[5] Mr Cannon was arrested for this offence, the offence of trafficking in drugs and other offences on 14 January 2003. He remained in custody on remand for those offences until 14 November 2003, a period of 304 days, when he obtained bail. Because he was remanded not only on this offence but also other offences, no declaration of time served could be made under s 161 *Penalties and Sentences Act* 1992 (Qld). After his arrest on this offence, he was charged with and granted bail on the home invasion offence which is alleged to have pre-dated this offence. He remained in the community on bail in respect of all offences until his conviction and sentence for the home invasion offences on 26 February 2004. Since these convictions were set aside on 19 November 2004, he has served about 100 further days of the sentence imposed for this offence so that he has presently served a total of about 404 days by way of sentence and remand although the remand period does not relate solely to this offence.

[6] Mr Cannon's counsel at sentence submitted that the ten month period of pre-sentence custody served in respect of this and other offences could best be taken into account by imposing a sentence concurrent with that imposed for the home invasion. During argument, the learned sentencing judge expressed the preliminary view that it was best to take into account time spent in pre-sentence custody in respect of which no declaration under s 161 can be made when "the most serious offences have been dealt with". Neither counsel attempted to dissuade his Honour from that view. His Honour made no further reference to the time spent in pre-sentence custody during the sentencing proceedings and it does not seem he mitigated the sentence in any way to reflect it.

[7] The tentative view expressed by his Honour as to when the remand period not within s 161 should be taken into account is inconsistent with observations of this Court in *R v Ainsworth*.[2] *Ainsworth* reaffirms the uncontroversial proposition stated in *R v Skedgwell*[3] that s 161 *Penalties and Sentences Act* 1992 (Qld) does not limit or exclude the general sentencing discretion to consider as a mitigating factor a period of pre-sentence custody not strictly within s 161 either by reducing the head sentence or accelerating the date for consideration for parole eligibility and that it is desirable that a sentencing court make plain in the sentencing remarks whether and to what extent such allowance has been made. As this Court indicated in *Ainsworth*, although ordinarily it is appropriate to take the whole of the pre-sentence custody into account at the first opportunity, a sentencing judge is not obliged so to do.

[8] Mr Reid now submits that, although the head sentence of two years imprisonment is within range, it should, consistent with *Ainsworth*, be suspended forthwith to adequately reflect both the period of pre-sentence custody not within s 161 and also, in the unusual circumstances here, the post-sentence custody. As noted, the learned primary judge in his sentencing remarks did not state that he took into account in any way the time spent in pre-sentence custody. Nor did his Honour refer to those observations in *Ainsworth* or *Skedgwell* set out earlier in these reasons, no doubt

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2 [2000] QCA 163; CA No 26 of 2000, 5 May 2000.

3 [1999] 2 Qd R 97.

because neither counsel cited them. There seems no reason why this Court, consistent with the observations in *Ainsworth* should not now give Mr Cannon credit for the time spent in pre-sentence custody which cannot be the subject of a declaration under s 161. Because this Court with the benefit of hindsight is now cognisant of the further days served under the sentence, justice requires that in re-exercising the sentencing discretion this Court take note of them.

[9] Apart from Mr Chapman's plea of guilty on the morning of trial, there is little to distinguish him from Mr Cannon. Mr Cannon was 43 years old at the time of the offence and Mr Chapman was 38. Each had some criminal history and had been sentenced to short terms of imprisonment in the past. It seems the sentencing judge considered that they were of roughly equal culpability and so imposed a two year sentence on each of them, a sentence which he regarded was sufficiently salutary to discourage people from attempting to take the law into their own hands instead of using the lawful criminal justice system. In suspending Mr Chapman's sentence four months earlier than Mr Cannon's, his Honour gave credit for Mr Chapman's late plea of guilty. Neither the sentencing remarks nor the sentence imposed suggest that his Honour significantly moderated Mr Cannon's sentence to reflect that it was cumulative. Mr Cannon has spent 304 days in pre-sentence custody for this and other offences. He has now served about 100 days of his sentence, a total of about 404 days. An appropriate sentence, which is consistent with the learned sentencing judge's intentions but takes the remand period outside s 161 into account at the first opportunity and which still requires him to serve 12 months imprisonment of the two year sentence before suspension, is to order that the two year sentence be now suspended forthwith. Any remaining short period of pre-sentence custody not taken into account on this sentence may be taken into account later if Mr Cannon is subsequently convicted of other offences for which he has also served pre-sentence custody not within s 161.

[10] I would grant the application for leave to appeal against sentence, allow the appeal and vary the sentence imposed at first instance by deleting the order that the term of imprisonment be suspended after serving a period of 12 months imprisonment to an order that the term of imprisonment be suspended forthwith and by deleting the order that the sentence be served cumulatively.

[11] **WILLIAMS JA:** At first instance the learned sentencing Judge had to mould a sentence to meet the circumstances which then existed. At the time the applicant stood for sentence he was undergoing a sentence of six years imprisonment imposed on 26 February 2004 for offences arising out of a home invasion which took place on 9 April 1999. The position was also complicated by the fact, as pointed out in the reasons for judgment of the President, that the applicant had spent time in custody on remand for a variety of offences some of which have not yet been dealt with by the courts.

[12] In my view, although no declaration could have been made pursuant to s 161 of the *Penalties and Sentences Act* 1992 (Qld) with respect to time already spent in custody, the learned sentencing Judge erred in not making some allowance for that consideration in imposing the sentence in question.

[13] The applicant's position has been further complicated by the fact that this court on 19 November 2004 set aside the convictions for the offences arising out of the home

invasion and ordered a retrial. That alone would require the sentence imposed on the applicant for the subject offence to be revisited.

[14] Although the presentence custody was with respect to the offence with which the court is now concerned and other charges which are yet to come before the courts (including a charge of drug trafficking), it is appropriate that the applicant on the sentence now in issue before this court be given credit for it. One does not know what the outcome on the other charges, including the retrial, will be.

[15] In circumstances such as this it is impossible to impose a sentence which takes into account with precision all competing relevant factors. At the end of the day a sentence must be moulded which imposes appropriate punishment for the criminal conduct in question and makes due allowance for time already spent in custody. In my view the solution proposed by the President is an adequate response to the issues raised by this application.

[16] I agree generally with all that has been said by the President in her reasons and with the orders proposed.

[17] **MACKENZIE J:** The essential facts are summarised in the President's reasons. On 5 August 2004, when the applicant was sentenced for an offence under s 539 of the *Criminal Code* 1899 (Qld) of attempting to procure the commission of a criminal act, he was serving a sentence of six years imprisonment with a serious violent offence declaration, imposed on 26 February 2004, for offences committed during a violent home invasion.

[18] For the offence under s 539 he was sentenced after trial to two years imprisonment suspended after 12 months, cumulative upon the sentence imposed on 26 February 2004. The applicant is also charged with carrying on the business of trafficking in dangerous drugs and other offences but his trial for them is yet to be heard. The offence under s 539 came to police notice incidentally when he was under surveillance and he was arrested for it at the same time as he was arrested for the drug offences.

[19] A complicating feature is that on 19 November 2004, the Court of Appeal allowed the applicant's appeal against conviction of the home invasion offences and ordered a new trial. That trial has not yet been held. The only sentence he is currently serving is that for the offence under s 539.

[20] At the time of sentence the applicant was not entitled to a declaration under s 161 of the *Penalties and Sentences Act* 1992 (Qld) in respect of time served because he had been in custody for other offences as well. However, the judicial discretion to make allowance for time already served was available.

[21] As the matter stands, it is speculative what will happen in the event that the applicant is re-tried for home invasion offences or tried for drug trafficking and the related offences. In the circumstances as they stand, the applicant is in my view entitled to some credit for time served, although mathematical exactness is not always obligatory in such cases. It is in my view not a case where the fact that there are pending trials should disentitle him from such allowance at this time.

[22] It should be observed that this is not a case where there is anything in the record indicating that the learned sentencing judge moderated the length of the sentence for the s 539 offence because of concern that the consequence of a cumulative sentence would be a disproportionately lengthy combined period of imprisonment. If that were the case, what has been said would not necessarily apply, since the sentence imposed may have been less than appropriate for an offence of that character standing alone because the sentencing judge had understandably proceeded on the factual error of substance that the prisoner would remain liable to serve the sentence upon which the second sentence was cumulative.

[23] In the particular circumstances of the case, I agree that the order should be as proposed by the President.